(1)

Supreme Court, U.S.
FILED

01 - 14 JUL 03 2001

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

MUCKLESHOOT INDIAN TRIBE,
Petitioner,

v.

PUYALLUP INDIAN TRIBE, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI

ROBERT L. OTSEA, JR.
Muckleshoot Indian Tribe
39015-172nd Avenue, S.E.
Auburn, WA 98092

GREGORY M. O'LEARY
821 Second Avenue
Suite 2000
Seattle, WA 98104

DONALD B. AYER
(Counsel of Record)
MICHAEL S. FRIED
CYNTHIA L. BAUERLY
Jones, Day, Reavis & Pogue
51 Louisiana Ave., N.W.
Washington, D.C. 20001

Counsel for Petitioner

84 PP

QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit violated principles of *res judicata* when it radically narrowed the geographic area of the Muckleshoot Indian Tribe's treaty-based right to fish, as that right was determined in a 1974 final judgment which was affirmed on appeal, and on which the Tribe has relied for twenty-seven years.

PARTIES TO THE PROCEEDING

The parties to this sub-proceeding are as follows: The Muckleshoot Indian Tribe; the Puyallup Indian Tribe; the Suquamish Indian Tribe; the Swinomish Indian Tribal Community; and the Tulalip Tribes.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTIONAL STATEMENT 1

TREATIES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 13

I. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE ADHERENCE TO APPLICABLE RULES OF *RES JUDICATA* AND REINSTATE THE TWENTY-SEVEN YEAR-OLD FINAL DETERMINATION OF THE DISTRICT COURT DEFINING THE FISHING RIGHTS OF THE MUCKLESHOOT TRIBE UNDER TREATIES WITH THE UNITED STATES 15

A. The Ninth Circuit Revisited and Altered the Unambiguous Finding That the Muckleshoot Tribe's Treaty Fishing Places Include "the Saltwater of Puget Sound" 15

B. The Ninth Circuit's Modification of Finding 76 Violates Principles of *Res Judicata* 19

1. Finding 76 Was Actually Litigated Before, And Finally Decided By The District Court in 1974 19

2. All Present Parties Were Parties To The Earlier Litigation, Or Expressly Agreed To Be Bound By It 20

C. The Doctrines of *Res Judicata* and Collateral Estoppel Are No Less Applicable on the Ground That The District Court Has Retained Jurisdiction Over *United States v. Washington* 21

II. THE NINTH CIRCUIT'S ERROR IS ONE OF EXCEPTIONAL IMPORTANCE, ALTERING, AS IT DOES, THE TREATY-BASED FISHING RIGHTS OF AN INDIAN TRIBE, AS DEFINED IN A TWENTY-SEVEN YEAR-OLD COURT DECISION, AND PROVIDING A PRECEDENT TO UNDERMINE THE FINALITY OF JUDGMENTS GENERALLY 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 23
Allen v. McCurry, 449 U.S. 90 (1980) 19
Am. Mail Line Ltd. v. United States, 377 F. Supp. 657 (W.D. Wash. 1974) 17
Arizona v. California, 460 U.S. 605 (1983) ... 24, 25, 27, 28
Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) 24, 25
Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 26, 29
Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848) 22
Georgia v. South Carolina, 497 U.S. 376 (1990) 27
Hoffman v. Blaski, 363 U.S. 335 (1960) 24, 25
Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731 (9th Cir. 1984) 23
Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) 26
Migra v. Warren City Sch. Bd. of Educ., 465 U.S. 75 (1984) 13
Minnesota Co. v. Nat'l Co., 70 U.S. (3 Wall.) 332 (1865) 26
Montana v. United States, 440 U.S. 147 (1979) 21
Montezuma Canal Co. v. Smithville Canal Co., 218 U.S. 371 (1910) 22
Nevada v. United States, 463 U.S. 110 (1983) 19, 21, 27, 28
New Hampshire v. Maine, 121 S. Ct. 1008 (2001) 19
Oklahoma v. Texas, 256 U.S. 70 (1921) 27
Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89 (1954) 22, 23
Riddick ex rel Riddick v. Sch. Bd., 784 F.2d 521 (4th Cir. 1986) 23
Schildhaus v. Moe, 335 F.2d 529 (2nd Cir. 1964) 16

TABLE OF AUTHORITIES
(continued)

Page

So. Pac. R. Co. v. United States, 168 U.S. 1 (1897) 26
United States v. Alpine Land & Reservoir, Co.,
984 F.2d 1047 (9th Cir. 16
United States v. Michigan, 623 F.2d 448
(6th Cir. 1980) 29
United States v. Mitchell, 463 U.S. 206 (1983) 27
United States v. Skokomish Indian Tribe,
764 F.2d 670 (9th Cir. 1985) 23
United States v. Suquamish Indian Tribe,
901 F.2d 772 (9th Cir. 1990) 6
United States v. Washington, 157 F.3d 630
(9th Cir. 1998) 3, 6, 19
United States v. Washington, 86 F.3d 1499
(9th Cir. 1996) 6
United States v. Washington, 9 F.3d 1555
(9th Cir. 1993) 6
United States v. Washington, 935 F.2d 1059
(9th Cir. 1991) 6
United States v. Washington, 459 F. Supp.
1020 (W.D. Wash. 1978) 5, 17
United States v. Washington, 520 F.2d 676
(9th Cir. 1975) 5, 20
United States v. Washington, 384 F. Supp. 312
(W.D. Wash. 1974), *aff'd & remanded*, 520 F.2d
676 (9th Cir. 1975), *cert. denied*,
423 U.S. 1086 (1976) ..... *passim*
Washington v. Courville, 676 P.2d 1011
(Wash. Ct. App. 1983) 6
Washington v. Daley, 173 F.3d 1158 (9th Cir. 1999) 6
Washington v. Washington State Commercial
Passenger Fishing Vessel Ass'n, 443
U.S. 658 (1979) 5, 20, 24

TABLE OF AUTHORITIES
(continued)

Page

STATUTES & RULES

28 U.S.C. § 1254(1) 1
The Treaty of Medicine Creek, Dec. 26, 1854, art. III, 10 Stat. 1132 1
Treaty of Point Elliott, Jan. 22, 1855, art. V, 12 Stat. 927 1
Wash. Admin. Code § 220-22-030(20) 8, 18
Fed. R. Civ. P. 60 ..... 14, 15, 29

MISCELLANEOUS

Columbia Gazetteer of the World (1998 ed.) 17
Developments in the Law: *Res Judicata,*" 65 Harv. L. Rev. 818, 835 (1952) 22
Lippincott's New Gazetteer (1913) 17
Merriam-Webster's Geographical Dictionary 961 (3d ed. 1997) 17
Maurice Rosenberg, *et al.*, *Elements of Civil Procedure* (5th ed. 1990) 21

PETITION FOR A WRIT OF CERTIORARI

The Muckleshoot Indian Tribe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit is reported at 235 F.3d 429 (9th Cir. 2000), and is reprinted at pages 3a to 18a of the appendix to this petition. The opinions of the district court are not reported, but are reprinted at pages 19a to 34a, and 35a to 44a, of the appendix to this petition.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on December 13, 2000. That court denied the Muckleshoot Indian Tribe's petition for rehearing on April 4, 2001. Pet. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATIES INVOLVED

The Treaty of Medicine Creek, Dec. 26, 1854, art. III, 10 Stat. 1132, 1133, and the Treaty of Point Elliott, Jan. 22, 1855, art. V, 12 Stat. 927, 928 both state:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . .

STATEMENT OF THE CASE

This petition arises from a sub-proceeding of the long-running case of *United States v. Washington*, pertaining to the treaty-based fishing rights of Indian Tribes in western Washington. The Muckleshoot Indian Tribe ["Muckleshoot"]

here seeks review of a decision of the Ninth Circuit Court of Appeals overturning a 1974 judicial determination, on which it has relied for a quarter century. The 1974 decision identifies the "saltwater of Puget Sound" as a usual and accustomed ("U&A") fishing area of the Muckleshoot Tribe in which it therefore enjoys treaty-based fishing rights.

In order to extinguish Indian title to lands west of the Cascades in what is now western Washington, the United States in 1854 and 1855 entered into the Stevens treaties with numerous Indian tribes,[1] in which all of the tribal lands were ceded to the United States while reserving the Indians' right to take fish at their "usual and accustomed grounds and stations," in both fresh and salt water. Predecessors of the present-day Muckleshoot Tribe entered into such agreements in the Treaties of Medicine Creek and Point Elliott.

In 1970, the United States, joined by fourteen intervening tribes, including Muckleshoot, sued the State of Washington in the United States District Court for the Western District of Washington, asserting the fishing rights of the Western Washington tribes and seeking to limit the regulatory power of the State over these rights. In 1974, following trial, District Judge George Boldt entered a detailed order, which he referred to as Final Decision # I, incorporating extensive findings of fact and conclusions of law. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

That order held that the tribes were entitled to a 50 percent share of the annual salmon harvest in case area waters, and ruled that the State's authority to regulate Indian fishing at their

---

[1] The mid-Nineteenth Century treaties with western Washington tribes were negotiated by Governor Isaac Stevens. Their history is discussed at length in the original 1974 district court decision in *United States v. Washington*, 384 F. Supp. 312, 353-57 (W.D. Wash. 1974).

usual and accustomed fishing stations and grounds was limited to ensuring conservation of the resource. *Id.* at 342-45, 406-08. The court further "heard extensive evidence and made findings with respect to each Tribes' usual and accustomed fishing grounds." *United States v. Washington,* 157 F.3d 630, 644 (9th Cir. 1998). The court recognized the widespread movements of Indian people in pursuit of fish, 384 F. Supp. at 350-51, 353, and the incompleteness of documentation of Indian fishing grounds at treaty times and the impossibility of precisely identifying all fishing places used at treaty times. *Id.* at 353, 401. Despite these obstacles, the court made clear its intention, based on the evidence before it, to define the extent of the party tribes' U&A grounds and stations, *id.* at 359-82, "wherein those tribes . . . are entitled to exercise their treaty fishing rights today." *Id.* at 402. It did so fully cognizant that the decision would delineate important property rights reserved to the tribes in the treaties, *see id.* at 331-32, 401-02, and with the stated intention to "finally settle . . . as many as possible of the divisive problems of treaty right fishing which for so long have plagued all of the citizens of this area, and still do." *Id.* at 330.[2]

In Finding of Fact No. 76 of Final Decision # I, the court defined the treaty-time U&A fishing grounds and stations of the Muckleshoot Tribe as follows:

> Prior to and during treaty times, the Indian ancestors of the present day Muckleshoot Indians had usual and accustomed fishing places primarily at locations on the upper Puyallup,

---

[2] In addition to setting out the usual and accustomed fishing areas of each of the tribes before the court, on which their reserved right to fish depends, the court also discussed at length the nature of the fishing practices engaged in by each tribe. The court's opinion evidences an in-depth consideration of the historical material, based on a trial record consisting of a 4,600 page transcript, including testimony of nearly 50 witnesses and more than 350 exhibits. 384 F. Supp. at 348. Final Decision # I includes 253 enumerated findings of fact and 48 conclusions of law.

> the Carbon, Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek and Newaukum Creek), and Lake Washington, and secondarily in the saltwater of Puget Sound.

384 F. Supp. at 367 (citations omitted). The pretrial order states that the United States asserted this very definition of the Muckleshoot U&A fishing areas, and that the State disputed that "all of these waters constituted usual and accustomed fishing ground, within the meaning of the treaty." ER 3.[3] Other plaintiff-intervenor tribes did not take issue with the use of "Puget Sound" to describe the scope of the Muckleshoot Tribe's marine fishing places.

With regard to the entirety of its Final Decision # I, the court specified that it was to be "unreservedly final and reviewable as provided by 28 U.S.C.A. 2201." 384 F. Supp. at 348.[4] The court reserved continuing jurisdiction, confined to six grounds, only one of which related to enforcement and interpretation of Final Decision # I:

> 25. The parties or any of them may invoke the continuing jurisdiction of this court in order to determine:
>
> a. whether or not the actions, intended or effected by any party (including the party seeking a determination)

---

[3] Pages from the Excerpts of Record before the court of appeals are herein designated "ER __." Pages from the Supplemental Excerpts of Record before the Ninth Circuit are herein designated "SER __."

[4] Final Decision # I and the related Findings of Fact and Conclusions of Law were entered on February 12, 1974. On March 22, 1974, Judge Boldt entered the Declaratory Judgment and Decree, and an Injunction, at which time his decision became a final judgment. The court deferred various issues not decided at trial for separate pretrial and trial proceedings, 384 F. Supp. at 348, but specified that these issues "do not have direct or indirect bearing upon any issue submitted and heretofore tried by this court." *Id.*

> are in conformity with Final Decision #I or this injunction[.]

384 F. Supp. at 419. There was no reservation of jurisdiction to set aside or modify any of the findings entered in Final Decision # I.

On appeal to the Ninth Circuit Court of Appeals, Final Decision # I was affirmed with minor modifications, *United States v. Washington,* 520 F.2d 676 (1975), and this Court denied certiorari. 423 U.S. 1086 (1976). Following entry of the initial decision, additional tribes intervened in the case and obtained determinations of their treaty status and fishing places. *See, e.g., United States v. Washington*, 459 F. Supp. 1020, 1040 (W.D. Wash. 1978).[5]

In 1978, confronted with a decision of the Washington Supreme Court directly rejecting the conclusions of Final Decision # I and the Ninth Circuit concerning the character of the treaty right to take fish, this Court granted certiorari "to interpret this important treaty provision" and "thereby to resolve the conflict between the state and federal courts regarding what, if any, right the Indians have to a share of the fish . . . ." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674 (1979). The Court substantially affirmed the previous decisions of the federal courts, ruling that the treaties reserved to the tribes a right to take a "fair share" of fish amounting to 50 percent of the harvest, and that the State's authority to regulate off-reservation treaty fishing was limited to measures necessary to achieve conservation of the species. *See id.* at 682. The Supreme Court raised no question concerning any of Judge Boldt's findings of

---

[5] As a condition of intervention, all of these tribes agreed to be bound by Final Decision # I to the same extent as the parties that had participated at trial. Order dated July 18, 1974, ¶ 5.

fact delineating U&A fishing places of the tribes, or any other factual aspect of his original decision.

Following the district court's 1974 decision, and in reliance thereon, the Muckleshoot Tribe has engaged in subsistence and commercial fishing for salmon, shellfish, and other species, in the central part of Puget Sound. In addition to Elliott Bay, on which Seattle's downtown waterfront is situated, members of the Muckleshoot Tribe have regularly fished in areas of Puget Sound to its north, west and south. *See, e.g.*, *Washington v. Courville*, 676 P.2d 1011, 1013, 1016 (Wash. Ct. App. 1983) (upholding against criminal challenge Muckleshoot tribal members' right under the Stevens treaties to fish around Adelaide Beach, which is adjacent to Redondo Beach); Pet. App. 45a (map).

Since 1974, pursuant to the district court's continuing jurisdiction, numerous matters have been brought before the district court as subproceedings of the original action, which have spawned numerous appeals to the Ninth Circuit.[6] *United States v. Washington* has become the largest case in the history of the Western District of Washington.[7]

---

[6] *See, e.g.*, *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999); *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998); *United States v. Washington*, 86 F.3d 1499 (9th Cir. 1996); *United States v. Washington*, 9 F.3d 1555 (9th Cir. 1993) (table); *United States v. Washington*, 935 F.2d 1059 (9th Cir. 1991); *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990).

[7] The case, now in its 31st year, has amassed more than 17,000 docket entries in the district court's files. More than a decade ago, the Ninth Circuit stated:

> We cannot think of a more comprehensive and complex case than this. Since 1974, there have been numerous supplemental proceedings with voluminous filings. In the proceedings below, this was one of 14 sub-proceedings and over 11,000 papers had been filed with the district court.

On January 9, 1997, intervenor-plaintiff Puyallup Indian Tribe, later joined by the Suquamish and Swinomish Tribes, filed sub-proceeding 97-1, seeking a determination that the phrase "saltwater of Puget Sound" in Finding of Fact 76 should be interpreted to include only "Elliott Bay," an area of roughly three and a half nautical square miles, and to exclude all other portions of Puget Sound, which covers an expanse at least 150 times that size. ER 123; *see* Pet. App. 45a (map). The Muckleshoot Tribe moved to dismiss, arguing that *res judicata* barred such a modification of Finding of Fact 76. SER 125.

The district court denied the Muckleshoot Tribe's motion to dismiss, concluding that the Finding's reference to Puget Sound was ambiguous, even though all of the Muckleshoot Tribe's claimed fishing places were within any commonly accepted definition of "Puget Sound."[8] ER 133-34. While the court acknowledged that its role was limited to ascertaining whether the Muckleshoot fishing activity was "in conformity" with Finding 76, ER 136-38, the court ruled that it could consider evidence other than Judge Boldt's decision to ascertain his intended meaning. ER 139-40.

On subsequent cross-motions for summary judgment, the district court reviewed evidence from the 1973 trial record, as well as anthropological evidence offered by the plaintiff Tribes that was never submitted at trial. On this basis, the district court entered summary judgment holding that Judge Boldt meant by his reference to "the saltwater of Puget Sound" to encompass only Area 10A, a fisheries management area largely

---

Suquamish Indian Tribe, 901 F.2d at 775.

[8] The Muckleshoot Tribe identified its intended fishing areas to include areas of Puget Sound, from the southern boundary of Admiralty Inlet (at Foulweather Bluff on the Kitsap Penninsula) south to the Tacoma Narrows. These areas are entirely within the central part of the Sound.

coextensive with Elliott Bay.[9] Pet. App. 45a (map). The district court acknowledged that its ruling was "perplexing in light of the geographic precision [Judge Boldt] generally used in describing U&As," and the fact that "as a resident of the Puget Sound area, it is fair to assume that [he] would not have used the terms 'Elliott Bay' and 'Puget Sound' interchangeably." ER 173-74. Nevertheless, finding that "there is no evidence in the record before Judge Boldt that supports a U&A beyond Elliott Bay," ER 174, the district court enjoined the Muckleshoot Tribe from fishing in the saltwater of Puget Sound outside Area 10A. ER 175-76.[10]

The Muckleshoot Tribe appealed, arguing that the district court's construction of Finding 76 was actually a modification of the unambiguous final order in violation of the requirements of *res judicata*. ER 177. The court of appeals affirmed without even mentioning *res judicata*. Pet. App. 8a. At the same time, the Ninth Circuit expressly declined to adopt the district court's premise that the reference to the "saltwater of Puget Sound" was ambiguous. Pet. App. 8a. Instead, it stated that the "debate about whether the language of Finding 76 is unambiguous is largely misdirected," because it was necessary to evaluate the documents and evidence before Judge Boldt "whether the text is ambiguous or not." Pet. App. 8a.

The Ninth Circuit then proceeded to evaluate and ultimately reject, piece-by-piece, the items cited in Finding 76, or otherwise offered to support the conclusion of a U&A fishing

---

[9] Area 10A was created by the Washington Department of Fisheries in 1979. Wash. Admin. Code § 220-22-030(20).

[10] After first suggesting that the word "secondarily" in Finding 76 might give rise to some ambiguity about the geographical scope of the phrase "Puget Sound," ER 134, the district court ultimately recognized that this word neither adds to nor detracts from the geographic scope of the U&A fishing area as defined in Finding 76. ER 174-75.

area encompassing the saltwater of Puget Sound.[11] The court first dismissed as "not very helpful," Pet. App. 9a, the language from the 1973 Pretrial Order. That Order made clear that, before the trial began, the United States claimed "the saltwater of Puget Sound" as a Muckleshoot U&A fishing ground, and the State defendants disputed that assertion.

The Ninth Circuit then addressed Judge Boldt's citations to three expert reports, from two experts — Dr. Barbara Lane on behalf of the plaintiffs, and Dr. Carroll Riley for the State of Washington.[12] The court referenced Dr. Lane's Summary Report, ER 9-22, Ex. USA-20, which discussed general Indian fishing practices without reference to particular tribes, and contained very brief "Conclusions Based on Available Documents and Ethnographic Data" relating to particular tribes. The Ninth Circuit simply quoted a single sentence from this "Conclusions" section, which stated that the "principal fisheries of the ancestors of the Muckleshoot" included a number of named rivers, Pet. App. 10a, and reasoned that the omission of a reference there to Puget Sound "was not inadvertent or inconsequential." Pet. App. 13a. The court wholly ignored Dr. Lane's prefatory statement, at the beginning of the "Conclusions," that "[t]he fisheries listed in this summary are

---

[11] The Ninth Circuit did not comment on the district court's partial reliance on extra-record evidence in interpreting Finding of Fact 76. In its opinion, the Ninth Circuit referred only to evidence that was part of the record in the district court prior to entry of Final Decision # I.

[12] Judge Boldt entered a finding that "where their testimony differs in any significant particular, the testimony of Dr. Lane is more credible than that of Dr. Riley and is accepted as such except as otherwise specified," 384 F. Supp. at 350, and he relied on Lane's report for many of his fact findings.

not to be taken as the only important fisheries of each group." ER 19.[13]

Dr. Lane also prepared more extensive individual reports pertaining to the separate tribes, including the Muckleshoot Tribe. The Ninth Circuit discussed one of these, an "Anthropological Report On The Traditional Fisheries Of The Muckleshoot Indians," ER 41-87, Ex. USA-27b, at some length. That court acknowledged Lane's statement that "[t]he traditional fisheries of the Muckleshoot . . . were not limited to the Puyallup . . ., Carbon . . ., Stuck, White, Green and Cedar Rivers, and Lake Washington" ER 48, and that "there was some trolling for salmon in salt waters when families descended the rivers to get shell fish supplies on the beaches of the Sound." *Id.* Although half of these rivers — the Stuck, the Carbon, and the Puyallup — joined at treaty time to form the Puyallup, which enters Puget Sound at Commencement Bay, about thirty miles south of Elliott Bay, *see* Pet. App. 45a, the Ninth Circuit inexplicably asserted that Dr. Lane's report made no reference to the "Muckleshoot's ancestors fishing on a drainage system that empties anywhere outside Elliott Bay." Pet. App. 13a. This assertion likewise ignores Judge Boldt's own finding that Muckleshoot predecessors included Indians who lived on "upriver portions of the Puyallup River," 384 F. Supp. at 366, and who had as U&A fishing areas, the upper Puyallup, the Carbon and the Stuck. *Id.* at 367.

Lane elsewhere stated that Commencement Bay was a "major fishing location," both for "upriver" peoples and Indians from other drainages. ER 12. While the Ninth Circuit seemed

---

[13] The Ninth Circuit opinion also evidenced the mistaken belief that the "Conclusions" was a freestanding document, rather than one section of Dr. Lane's general Summary. Pet. App. 9a. This is important because the Summary made clear in various ways that it did not purport to define particular practices of specific tribes. *E.g.*, ER 9.

unaware of the Muckleshoot's status as an "upriver" people on the Puyallup and its tributaries, it also asserted that the Muckleshoot ancestors were blocked from following the Puyallup River to the Sound by the intervening "territory of the Puyallup Tribe." Pet. App. 13a-14a. This reasoning was directly contradicted by substantial evidence that the tribes moved about freely, regularly passing through areas occupied by other tribes.[14]

Additional evidence of Muckleshoot treaty-time presence in Puget Sound outside Elliott Bay that was before the district court in 1974 and supported its finding was ignored or dismissed by the court below. The court in 1974 received evidence based on the work of anthropologist Marian Smith noting that Indians from the area of the Muckleshoot Tribe's ancestors "made special trips to the Sound in the neighborhood of what is now Redondo Beach where devil fish were plentiful" — roughly twenty-five miles south of Elliott Bay, near Commencement Bay. ER 90; *see also* ER 111 (people from Green and White River villages customarily fished at Redondo). The Ninth Circuit dismissed this statement on the ground that devil fish are octopi that were picked up while asleep on the beach. Pet. App. 16a. However, when coupled with Lane's reports of trolling in the saltwater when the Muckleshoot ancestors came down to the beaches, Smith's report further supports the district court's finding.

---

[14] For example, Dr. Lane stated that freshwater fisheries including rivers were, except in the Winter, generally shared by local residents and visitors from other localities. ER 11. Muckleshoot predecessors thus could fish in areas occupied by the Puyallup; "[v]isitors from beyond the immediate locality would arrive to take advantage of particular runs not available in their streams or not running at that particular time in their locality," ER 12. They could likewise pass through on their way to those areas downriver; "[p]eople living upriver on a given drainage system would normally come to the saltwater areas at the mouth of the river to obtain fish and shellfish." ER 12.

So, too, does the direct testimony of Puyallup tribal members before the Indian Claims Commission about treaty-time use by tribes "includ[ing] the Muckleshoot" of "areas lying on the islands in *southern* Puget Sound." ER 100 ¶ 12 (emphasis added). The Ninth Circuit dismissed this evidence as well, on the sole ground that in a wholly distinct context, Judge Boldt had found a different ICC finding to be unpersuasive. Pet. App. 17a.

The Ninth Circuit also discussed briefly the report of the State's expert, Dr. Riley, which noted that Muckleshoot ancestors occasionally made trips down-river to Elliott Bay to fish. Dr. Riley did not expressly deny saltwater fishing by Muckleshoot in other areas, and the Ninth Circuit acknowledged Judge Boldt's ruling that Dr. Lane's report would prevail over Dr. Riley in any case of inconsistency. The Ninth Circuit nonetheless found Judge Boldt's citation of Dr. Riley's report to be supportive of an inference that Judge Boldt may have meant to limit the U&A to Elliott Bay. Pet. App. 16a-17a.

In sum, the Ninth Circuit recognized that the trial record contained evidence probative of treaty-time fishing by Muckleshoot predecessors at locations in Puget Sound outside Elliott Bay. It nonetheless held that Judge Boldt could not have intended to include such areas because this evidence did not demonstrate fishing in Puget Sound outside Elliott Bay with "enough regularity to establish them as U&A [usual and accustomed] grounds." Pet. App. 15a.[15] The court reached this

---

[15] This conclusion completely ignores Dr. Lane's discussion of the fragmentary nature of historical documentation of fishing practices, ER 16-18, 42-45, and its frequent failure to identify the tribal groups involved, ER 44, which, when coupled with the peripatetic nature of Indian fishing practices, makes it impossible "to compile a complete inventory of any tribe's usual and accustomed grounds and stations" based on specific

conclusion notwithstanding Judge Boldt's express language identifying the area of the U&A as "Puget Sound," which it did not find to be ambiguous in any respect.

On April 4, 2001, the Ninth Circuit panel denied the Muckleshoot Tribe's timely filed petition for reconsideration with suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit decision presents an important question, requiring resolution by this Court, whether federal courts that have retained jurisdiction over complex cases may reconsider and overturn decades-old findings of fact and legal conclusions that have been fully litigated and on which all appeals have been exhausted. In re-weighing the evidence on which Judge Boldt's 1974 final determination of tribal fishing rights was based and concluding that the Muckleshoot U&A fishing area was limited to Elliott Bay rather than Puget Sound, the Ninth Circuit failed to follow basic principles of *res judicata* and collateral estoppel as enunciated by this Court.[16] That fact is no

---

historic evidence for each one. ER 16. In the case of Muckleshoot, the reasonableness of drawing inferences based on the limited historic record is increased by the fact that during treaty-times, there was no organized Muckleshoot Tribe, whose predecessors then existed as "a bewildering number of politically autonomous village units composed of one or more multi-family dwellings." ER 33. Accordingly, one would expect to find only limited surviving evidence of the presence of such disparate groups. Judge Boldt was strongly influenced by these considerations, and by Dr. Lane's conclusion that, under these circumstances, a proper "inventory is possible only by designating entire water systems" — even if the Ninth Circuit was not. ER 16; *see* 384 F. Supp. at 353, 402.

[16] The phrase "*res judicata*" is most often used to refer to the totality of "[t]he preclusive effects of former adjudication," including both "claim preclusion" and "issue preclusion" (or "collateral estoppel"). *Migra v. Warren City Sch. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984). As

less true because the court below was acting pursuant to retained jurisdiction.

The decision of the court below transcends the bounds of ordinary error and becomes a matter demanding this Court's attention by virtue of the nature of the underlying controversy and rights involved. This Court has long given special weight to the importance of *res judicata* and collateral estoppel where the rights of large numbers of people to the utilization of natural resources are concerned, and especially where the claims of Indian tribes under treaties, to land, water, or fishing rights are in issue. In this case, the Muckleshoot Tribe has exercised fishing rights consistent with the original 1974 decree throughout the intervening period. That decision was final, and the Ninth Circuit should not have entertained the request by several tribes who share a common fishing area with Muckleshoot to revise the terms of the final judgment to exclude Muckleshoot from the fishery.

The Ninth Circuit's reconsideration and partial reversal of Final Decision # 1 not only overturns long-settled expectations in this case, but provides a precedent for overturning final decisions in a broad range of cases, by assigning new meanings to the prior court's words, based on a present day reassessment of the evidence. The risk of undoing judgments posed by this new approach to interpretation of unambiguous judgments may well be greatest in cases where courts have retained jurisdiction — which tend to be precisely those cases where the interests of

---

demonstrated in Part I.B. below, the Ninth Circuit's modification of Judge Boldt's final order plainly violated both components of *res judicata*, because that prior decision finally adjudicated the litigants "claims" to fishing rights under the Stevens treaties and also decided the factual "issue" of the Muckleshoot Tribe's usual and accustomed fishing places at treaty times. Thus, "*res judicata*" is used herein to refer both to claim preclusion and to collateral estoppel.

many are at issue and where finality is most important. No reason appears, though, why the same approach is any less applicable to cases of all descriptions. This Court should therefore grant the requested writ to conform Ninth Circuit law to the requirements of *res judicata*.

I. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE ADHERENCE TO APPLICABLE RULES OF *RES JUDICATA* AND REINSTATE THE TWENTY-SEVEN YEAR-OLD FINAL DETERMINATION OF THE DISTRICT COURT DEFINING THE FISHING RIGHTS OF THE MUCKLESHOOT TRIBE UNDER TREATIES WITH THE UNITED STATES

A. The Ninth Circuit Revisited and Altered the Unambiguous Finding That the Muckleshoot Tribe's Treaty Fishing Places Include "the Saltwater of Puget Sound"

The Ninth Circuit rewrote Judge Boldt's Finding 76, baldly replacing the finding that Muckleshoot's U&A included "the saltwater of Puget Sound" with the radically different finding limiting the saltwater U&A to Area 10A, within the confines of Elliott Bay. While the panel sprinkled its opinion with references to "interpret[ing]" Finding 76, *e.g.*, Pet. App. 6a, its methodology amounted at best to wholly improper, direct and very skeptical review of the finding, and at worst to *de novo* factfinding by the court of appeals.

The Ninth Circuit disclaimed any pretense of an ambiguity arising from the operative phrase, "the saltwater of Puget Sound," and never suggested that those words might reasonably be used inter-changeably with Elliott Bay. Pet. App. 8a. Yet it did not follow the directives of Rule 60(b) of the Federal Rules of Civil Procedure, which are applicable when a party

seeks to be relieved from the effects of a judgment.[17] Instead, it engaged in a detailed review of the underlying record evidence that was before Judge Boldt for the ostensible purpose of determining whether the district court meant what it actually said, ultimately determining that it did not because, in its view, such a result was not adequately supported by the evidence. *See* Pet. App. 18a (concluding that Finding 76 does not extend beyond Area 10A because the "evidence is . . . insufficient to establish a saltwater U&A beyond Elliott Bay").

The panel's method of permitting litigants to delve back into the record of a decades-old final judgment to re-"interpret" an unambiguous finding with which it disagrees is entirely indefensible. Permitting serial appeals of the evidence — first to see whether what the district court said was erroneous and second to see whether the district court really meant to say something that would have been erroneous — creates a systemic likelihood that many finally adjudicated and appealed judgments will be overturned years or decades after they are final. Using this method of declaring that the "meaning" of the prior judgment must match the current panel's substantive

---

[17] It is obvious that the six provisions of Rule 60(b) allow for no relief. Refuge in sections (1), (2) and (3) — commonly applied in the context of mistake, newly discovered evidence or fraud — is impossible, as these provisions are subject to a one-year time limit, obviously far exceeded by the twenty-seven years since judgment was made in this case. Rule 60(b)(4), providing relief from a void judgment, is also clearly inapplicable. Although Rule 60(b)(5) provides for relief when the prospective application of a judgment is "no longer equitable," this is no substitute for a timely appeal. *Schildhaus v. Moe*, 335 F.2d 529, 530 (2nd Cir. 1964). Rule 60(b)(6), although ostensibly available for "any other reason justifying relief," in fact "has been used sparingly as an equitable remedy to prevent manifest injustice," and its utility is limited only to those "extraordinary circumstances" in which a party was prevented "from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land & Reservoir, Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993).

views about which findings would be best supported by the evidence, the Ninth Circuit produced a new Muckleshoot U&A that bears scant resemblance to that found by Judge Boldt in 1974. On the face of the language used, it is wholly implausible to conclude that Judge Boldt could have used the words "Puget Sound" while meaning to restrict the Muckleshoot fishing area to Elliott Bay.

In the first place, the plain meaning of "Puget Sound" unambiguously extends far outside Area 10A — and also unambiguously encompasses all areas where the Muckleshoot Tribe claims saltwater fisheries in the Sound — which must be why the Ninth Circuit expressly disclaimed reliance upon any ambiguity, Pet. App. 8a. *See, e.g.*, *Merriam-Webster's Geographical Dictionary* 961 (3d ed. 1997) (defining "Puget Sound" as extending "from E end of Strait of Juan de Fuca through Admiralty Inlet; ab. 80 mi. (130 km.) long at its greatest extent"); *Columbia Gazetteer of the World* 2529 (1998 ed.) (defining "Puget Sound" as extending from the "Strait of Juan de Fuca, main entrance to sound through the Admiralty Inlet"); *Lippincott's New Gazetteer* 1502 (1913) (defining "Puget Sound" as "communicat[ing] with Admiralty Inlet . . . and the Strait of Juan de Fuca"); *Am. Mail Line Ltd. v. United States*, 377 F. Supp. 657, 658 (W.D. Wash. 1974) (noting that the Puget Sound extends "from Olympia on the south to the Strait of Juan de Fuca on the north"). *See* Pet. App. 45a (map). Neither respondents nor the courts below adduced any evidence indicating, to the contrary, that "Puget Sound" might refer only to Elliott Bay, because there is none. Indeed, the Ninth Circuit in this very opinion referred to Area 11 — the area around Vashon Island to the south of Elliott Bay, and the very area that it held not to be within the U&A defined as "the saltwater of Puget Sound" — as "Area 11 *of Puget Sound*." Pet. App.4a. (emphasis added).

Moreover, Final Decision # I unequivocally confirms that the court did not intend to use the phrase "Puget Sound" in some unheard-of sense to be limited to Elliott Bay. Thus, for example, Judge Boldt in the very same opinion expressly referred to "the American portion of the Puget Sound," 384 F. Supp. at 328, and described the Puyallup's own U&A as including "portions of Puget Sound" adjacent to Vashon Island, *Id.* at 371 ¶ 99, implicitly recognizing, in both instances, the broad expanse of Puget Sound. In a later decision, he used the phrase "Puget Sound" to include the area from Vashon Island to the Fraser River (in Canada), 459 F. Supp. at 1049 ¶ 5 (defining Suquamish U&A). These usages are obviously flatly inconsistent with the narrow understanding of "Puget Sound" adopted by the Ninth Circuit.

Nor can there be any argument (which the Ninth Circuit declined to advance, in any event) that Judge Boldt may have used the words "Puget Sound" as some sort of synecdoche to refer to one small and undefined part of the Sound. Final Decision # I made clear the court's intention to define fishing rights by explicit reference to U&A fishing areas, and in context the language identifying the saltwater of Puget Sound as a U&A fishing area was an unmistakable determination of legal rights. Had the court meant to include only a portion of Puget Sound, it would have said so here, as it did elsewhere in the same opinion. *See, e.g.*, 384 F. Supp. at 360 ¶ 46 (defining Lummi U&A as specified parts of the Sound); 371 ¶ 99 (same for Puyallup U&A).[18]

---

[18] The inescapable conclusion that Judge Boldt meant what he said is reinforced by the fact that Area 10A is itself defined as only a *part* of "Puget Sound." *See* Wash. Admin. Code. § 220-22-030(20) (defining "Area 10A" as "those waters *of Puget Sound* easterly of a line projected 185 degrees true from the southwest corner of Pier 91 through the Duwamish Head light to Duwamish Head" (emphasis added)). He did not limit Finding 76 to this fragmentary part of Puget Sound.

B. The Ninth Circuit's Modification of Finding 76 Violates Principles of *Res Judicata*

Res judicata refers "to the effect of a prior judgment in foreclosing successive litigation" of claims or issues between the parties. *New Hampshire v. Maine*, 121 S. Ct. 1808, 1814 (2001). Its rules thus operate to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Application of *res judicata* requires first, that the same claim or issue was previously litigated and finally determined, and second that the actions involve the same parties, or parties in privity with each other. *Nevada v. United States*, 463 U.S. 110, 130 (1983). Both of these criteria are satisfied here, and the Ninth Circuit's alteration of Finding 76 thus violates the core principle of finality of judgments.

1. Finding 76 Was Actually Litigated Before, And Finally Decided By The District Court in 1974

The issue of the U&A fishing areas of Muckleshoot (and other tribes) was an essential part of the 1974 ruling that was actually litigated before and decided by Judge Boldt. The parties adduced "extensive evidence" at trial regarding the plaintiff tribes' fishing practices at the time of the underlying treaties, including the geographical scope of such fishing and the methods used. *United States v. Washington*, 157 F.3d 630, 644 (9th Cir. 1998). As discussed in the Statement above, the parties disputed the precise extent of the Muckleshoot saltwater U&A before trial; two experts interpreted the fragmentary historical record for the court in two reports; the trial court resolved disagreements in favor of the Government's expert, Dr. Lane; and Dr. Lane concluded that the Muckleshoot Tribe's disparate predecessors regularly traveled about in search of fish, that they traveled down rivers to the beaches in their area,

including rivers ending outside of Elliott Bay, and that they trolled in the Sound when they did so. Other independent evidence received by the trial court establishes the treaty-time presence of Muckleshoot predecessors in areas in and surrounding Puget Sound, outside of Elliott Bay. As relevant here, all of this evidence demonstrates that the extent of the Muckleshoot U&A was fully litigated at trial, and that the district court was making a deliberate ruling when it utilized the words "Puget Sound" rather than the alternative "Elliott Bay" U&A mentioned by Dr. Riley.

The district court's intention that its decision in this respect be final, and not a tentative or interlocutory finding subject to future revision, also could not be clearer. 384 F. Supp. at 330, 348. The parties had a full opportunity to appeal this final ruling, and the Ninth Circuit affirmed in all material respects. 520 F.2d 676. After once denying certiorari on direct review, 423 U.S. 1086, this Court ultimately reviewed and affirmed Judge Boldt's order, with further modifications not relevant here, when the Washington Supreme Court entered a contrary decision. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

Accordingly, respondents did not and cannot argue that Finding 76 was anything other than unreservedly final for purposes of *res judicata*.

2. All Present Parties Were Parties To The Earlier Litigation, Or Expressly Agreed To Be Bound By It

The Muckleshoot and Puyallup tribes intervened as plaintiffs before Judge Boldt entered his Final Decision # I. The Suquamish and Swinomish tribes, co-plaintiffs in the present sub-proceeding, intervened thereafter, but were permitted to do so only on the express condition that they would be bound by

the Final Order to the same extent as the parties that had participated at trial. Order dated July 18, 1974.

Thus, this sub-proceeding involves the same parties as were involved in the original litigation, or are otherwise in privity with respect to that litigation, *see, e.g.*, *Montana v. United States*, 440 U.S. 147, 151, 164 (1979) (finding claim preclusion as to United States even though not formally a party to the earlier action).[19]

C. The Doctrines of *Res Judicata* and Collateral Estoppel Are No Less Applicable on the Ground That The District Court Has Retained Jurisdiction Over *United States v. Washington*

In light of the foregoing, the Ninth Circuit clearly violated the requirements of *res judicata* and collateral estoppel. This is true notwithstanding the fact that the district court has retained jurisdiction over *United States v. Washington* since 1974. That retention of jurisdiction in no way undermines the finality of the determination of Muckleshoot U&As as defined in Final Decision # I.

Judge Boldt retained jurisdiction only over defined issues, which, as acknowledged by the district court below, Pet. App. 23a-24a, includes only determinations of conformity of

---

[19] Nor could the parties' formal status as co-plaintiffs in the original litigation affect the applicability of *res judicata*. As the Court held in *Nevada v. United States*, 463 U.S. 110, 139-43 (1983), the interests of co-parties in a water-rights allocation proceeding are "sufficiently adverse" to give rise to *res judicata* even if the parties were nominally co-parties in the earlier case. *Id.* at 140. In that case, "the Court in essence held that since a water rights adjudication is a zero-sum game, everyone is the adversary of everyone else." Maurice Rosenberg, *et al.*, *Elements of Civil Procedure* 970 (5th ed. 1990). The same rationale applies here because fish caught by one Tribe are not available to others.

particular conduct with the court's decision. 384 F. Supp. 419, ¶ 25(a). Such continued involvement in a complex, multi-party case like this one in no way qualifies the preclusive effect of the judgment, as affirmed, with respect to those issues that the court *did* finally decide. That is, "a case . . . over which the court retains jurisdiction for some purposes[] may nonetheless be final [for *res judicata* purposes] as to other issues determined." "Developments in the Law: *Res Judicata,*" 65 Harv. L. Rev. 818, 835 (1952).

This point is firmly established by this Court's precedents. This Court, early on, held that when a decree decides the right to the property in contest and directs it to be delivered or sold, and the complainant is entitled to have it carried into immediate execution, the decree must be regarded as final as to that property although it may be necessary, by a later decree, to adjust the account between the parties. *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 204 (1848). Thus, the Court in *Forgay* held that the judgment at issue was final notwithstanding the express reservation by the district court of jurisdiction to decide further issues. *See id.* at 202-03. Courts after *Forgay* have thus recognized that the fact that a case is ongoing is no necessary obstacle to its *res judicata* effect.

In *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U.S. 371 (1910), for example, the Court held a district court's findings of fact and conclusions of law in a water rights case to be *res judicata* in a later action, notwithstanding the fact that the district court's decree in the first case retained jurisdiction to allow parties to "apply to th[at] court for any proper modification of th[e] order or in the supervision and direction of the [court-appointed] commissioner" charged with implementing the decree on an ongoing basis. *Id.* at 380 n.1.

Likewise, in *Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89 (1954), this Court held a finding of fact and

associated conclusion of law in an earlier phase of a single lawsuit to be *res judicata* with respect to a later-tried counterclaim in the same case. *See id.* at 101 (holding that the first judgment "was a final disposition of the determinative issue on the counterclaims"). The Court noted that the issues had been actually litigated in the earlier phase of the case, *id.* at 95, that the district court's decision of the issue was necessary to its disposition of that phase of the case, *id.* at 100-01, and that the losing party had had the opportunity to appeal the ruling, and had exercised that right, *id.* at 98-100.[20]

Some statements in prior decisions might, in isolation, be misread to suggest that in a case where there is continuing jurisdiction, even where certain matters have gone to a final determination with full appellate review, only the lesser limitation of law of the case is applicable.[21] *See, e.g.*,

---

[20] While two Justices dissented from the Court's application of *res judicata* in *Partmar Corp.*, they did not contend that the fact that the earlier ruling occurred in the same case diminished its *res judicata* effect. Rather, they disputed the Court's findings that the issues had been actually litigated, and that the losing party had an opportunity adequately to litigate the issue. *See id.* at 104-09 (Warren, C.J., dissenting).

The courts of appeals likewise have recognized that *res judicata* applies to orders in ongoing cases. *See, e.g.*, *Riddick ex rel Riddick v. Sch. Bd.*, 784 F.2d 521, 530-31 (4th Cir. 1986) (finding preclusive in a subsequently filed action a district court order notwithstanding language therein authorizing any party to "reinstate this action for good cause shown"); *United States v. Skokomish Indian Tribe*, 764 F.2d 670, 672-73 (9th Cir. 1985) (recognizing principles of *res judicata* in ongoing case but finding them inapplicable to the new claim at issue); *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 739-41 (9th Cir. 1984) (en banc) (recognizing *res judicata* effect of order in federal proceeding notwithstanding the fact that the action was ongoing in state court).

[21] The doctrine of the law of the case generally precludes relitigation of issues "decided in earlier stages of the same litigation," *see, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 236 (1997), but is less categorical in precluding revisiting issues than the entirely non-discretionary *res judicata*. *See, e.g.*,

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances"); *Arizona v. California*, 460 U.S. 605, 619 (1983) (stating that "*res judicata* and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment"); *Hoffman v. Blaski*, 363 U.S. 335, 340 n.9 (1960) (stating that an order was not *res judicata* with respect to a later decision, because, *inter alia*, they "were entered in the same case by courts of coordinate jurisdiction").[22]

Read in context, these statements are fully consistent with the clear principle that *res judicata* applies with regard to fully litigated final determinations, whether or not the deciding court retains jurisdiction over the case. That is true because in *none*

Arizona v. California, 460 U.S. 605, 619 (1983).

[22] In *Fishing Vessel*, when this Court granted certiorari to review the contrary decision of the Washington Supreme Court, it declined, in a footnote, to treat as finally adjudicated the matters in Judge Boldt's opinion, because of the "interlocutory stage of the proceedings — the District Court has retained continuing enforcement jurisdiction over the case." 443 U.S. at 672 n.19. There was, on those facts, every reason for the Court to grant certiorari in *Fishing Vessel* to resolve the direct conflict between that decision and Judge Boldt's prior decision, even if the earlier decision was final and binding. Thus, the Court's action was an unsurprising exercise of the Court's certiorari jurisdiction, which is not infrequently exercised to resolve conflicts between federal courts and State Supreme Court decisions. In any event, the 1974 order is certainly final and binding upon the lower courts, having now been fully reviewed and affirmed with modifications, by the Court in that case.

of those cases had there been a final adjudication on the merits with an opportunity to appeal.[23]

In *Arizona*, while the Court made clear that law of the case and not *res judicata* governs in such an instance of retained jurisdiction in an original action before the Supreme Court, it nonetheless recognized the importance of finality and adhered to its prior decision. 460 U.S. at 623-24, 626. And in so doing, the Court clarified that in the more usual case, where appellate review is available, exhaustion of such appeal will trigger *res judicata:*

> Such litigation proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which after appeal, the binding finality of *res judicata* and collateral estoppel will attach.

Id. at 619.

Accordingly, the principles of *res judicata* and collateral estoppel are fully applicable — with regard to issues that have been fully and finally adjudicated with appropriate opportunity for appellate review — whether or not the trial court retains jurisdiction over the case. The decision of the Ninth Circuit in

---

[23] *Christianson* involved the direct review by this Court of a series of procedural transfer orders between the Federal Circuit and the Seventh Circuit regarding jurisdiction. *See* 486 U.S. at 806-07. Far from having had a previous opportunity to seek review of those rulings, the parties were seeking such review for the first time in *Christianson* itself.

The footnoted dictum in *Hoffman* involved an interlocutory ruling, not on the merits, that did not even decide the question at issue in the later proceeding, where no argument of preclusion was advanced by any party. *See* 363 U.S. at 340-41 & n.9. Thus, *res judicata* certainly would not have applied in any event.

this case is thus in no way justified by the district court's retention of jurisdiction over *United States v. Washington* for more than a quarter century.

II. THE NINTH CIRCUIT'S ERROR IS ONE OF EXCEPTIONAL IMPORTANCE, ALTERING, AS IT DOES, THE TREATY-BASED FISHING RIGHTS OF AN INDIAN TRIBE, AS DEFINED IN A TWENTY-SEVEN YEAR-OLD COURT DECISION, AND PROVIDING A PRECEDENT TO UNDERMINE THE FINALITY OF JUDGMENTS GENERALLY

The general justifications for finality of judicial decisions — "to secure the peace and repose of society by the settlement of matters capable of judicial determination," *So. Pac. R. Co. v. United States*, 168 U.S. 1, 48-49 (1897) — are of greater or lesser consequence depending on the nature of the controversy in issue. In general, finality serves the purpose of letting people get on with their lives within a framework of known rights and obligations on which they can rely. It has thus been recognized as no "mere matter of practice or procedure," but rather a "rule of fundamental and substantial justice, 'of public policy and private peace.'" *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 299 (1917)). And the more substantial the rights in issue, the more important the role of finality becomes.

It is thus not surprising that finality takes on special importance where property rights are involved. "That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). And where those property rights relate to real property or water, "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith." *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983). As this Court stated in *Minnesota Co. v. Nat'l Co.*, 70

U.S. (3 Wall.) 332, 334 (1865), "[w]here questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open." *Accord Arizona*, 460 U.S. at 619-20. Finality is so important in cases such as these precisely because the matters in controversy are fundamental to the lives and livelihoods of large numbers of people.

Decisions of this Court also establish that consistency and finality is of paramount importance in the interpretation of treaties. In that context, "principles of simplicity and finality" and "respect for settled expectations that generally attends the drawing of interstate boundaries" have guided this Court away from treaty interpretations under which resulting rights would be in flux. *Georgia v. South Carolina*, 497 U.S. 376, 396-97 (1990). And interpretations of treaty terms, once finally rendered, have been adhered to. Thus, in *Oklahoma v. Texas*, this Court refused to relitigate the location of a boundary line determined by a treaty, which had been established in a prior case in the context of deciding the allocation of an area of land. 256 U.S. 70, 91-93 (1921). The Court held the prior interpretation was *res judicata* with respect to the part of the boundary disputed by the parties and that it settled "the construction of article 3 of the Treaty of 1819 as to the entire course of the Red river where it marks the boundary." *Id.* at 93.

Where rights to land or natural resources are defined by the interpretation of treaties, and the sovereign rights of Indian tribes, with whom the United States has a special relationship are concerned, *see, e.g.*, *United States v. Mitchell*, 463 U.S. 206, 225-26 (1983), the critical role of finality and *res judicata* is perhaps at its peak. That fact is illustrated by two recent decisions of this Court.

In *Nevada v. United States*, 463 U.S. 110 (1983), this Court refused to permit the United States to relitigate the allocation of

rights to water from an irrigation project, among Indian tribes, irrigators, and a state, that had been previously determined in 1944. With the potential to disrupt settled expectations of thousands of individuals in several states and on Indian reservations, the Court held that the prior decision was final and that *res judicata* barred the second attempt to allocate the parties' water rights. *Id.* at 129. The Court did not simply hold that the prior decree could not be set aside as a whole, but held that *res judicata* prevented it from being even partially undone.

Because of the strong interest in finality and certainty with respect to water rights, in a case arising under this Court's original jurisdiction, this Court in *Arizona v. California* adhered to its own prior determination of tribal water rights pursuant to treaties with the government. 460 U.S. 605 (1983). While the Court found *res judicata* not directly applicable to this case of continuing jurisdiction where no appeal was possible, it nonetheless applied the policies behind the doctrine in refusing to depart from its prior decision. "A major purpose of this litigation . . . has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system." *Id.* at 620. The Court noted the "fundamental precept of common-law adjudication . . . that an issue once determined by a competent court is conclusive." *Id.* at 619. Accordingly, relying on the "strong interest in finality," this Court refused to upset the settled expectations of the citizens of five states and five Indian reservations concerning their shares of existing water rights. *Id.* at 620. The Court reiterated these principles in another opinion in the *Arizona* case last term, 530 U.S. 392, 400-01 (2000), but found that the issue in question had not been previously determined, *id.* at 420.

Fishing rights in and around Puget Sound, like water rights in the Southwest, have a significant impact on the citizens of Western Washington state, especially Indian tribes in the area.

Both sustenance and commercial fishing require a settled understanding of where the tribes are entitled to exercise their rights to fish. The tribal parties and citizens of Washington state have relied on Final Decision # I for more than twenty-five years. The Ninth Circuit's decision is an enormous source of "uncertainty and confusion," *Federated Dep't Stores*, 452 U.S. at 398-99 (internal quotation marks omitted), for all those concerned about such issues, and radically departs from the settled expectations of the parties.

More generally, the Ninth Circuit's notion that even unambiguous judicial decrees open the door to a reevaluation and reweighing of the record evidence, sets a precedent for ignoring finality in any case of continuing jurisdiction. That precedent, if allowed to stand, could produce serious disruptions in precisely those areas where the doctrine of *res judicata* is most important. There are numerous cases where courts have retained jurisdiction over cases involving complex resource-rights allocations. *See, e.g., United States v. Michigan*, 623 F.2d 448 (6th Cir. 1980) (per curiam) (involving Indian tribes' treaty-based gill net fishing rights). Even apart from cases of retained jurisdiction, the Ninth Circuit's holding appears to allow unambiguous judgments quieting title to real property or adjudicating real property boundaries — or any other kind of judgment — to be freely reopened and amended by a later court convinced that the record evidence in the earlier case did not adequately support the first court's judgment. Actions could thus be subject to review by separate tribunals after the appellate process had been fully exhausted, without regard to the procedural limitations imposed by Rule 60(b) of the Federal Rules of Civil Procedure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. OTSEA, JR.
Muckleshoot Indian Tribe
39015-172nd Avenue, S.E.
Auburn, WA 98092

GREGORY M. O'LEARY
821 Second Avenue
Suite 2000
Seattle, WA 98104

DONALD B. AYER
(Counsel of Record)
MICHAEL S. FRIED
CYNTHIA L. BAUERLY
Jones, Day, Reavis & Pogue
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES of America, et al., Plaintiffs, and PUYALLUP INDIAN TRIBE; SUQUAMISH INDIAN TRIBE; SWINOMISH INDIAN TRIBAL COMMUNITY, Intervenor-Plaintiffs/ Petitioners -Appellees, v. MUCKLESHOOT INDIAN TRIBE, Intervenor-Plaintiff/ Respondent-Appellant, v. STATE OF WASHINGTON, et al., Defendants.	No. 99-35960 D.C. No. CV-70-09213-BJR (Western Washington) ORDER [FILED APR. 4, 2001]

Before: Chief Judge SCHROEDER, BEEZER, and HAWKINS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Chief Judge Schroeder and Judge Hawkins have voted to reject the suggestion for rehearing en banc. Judge Beezer has recommended rejection of the en banc suggestion.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P.35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES of America, et al., Plaintiffs,
and
Puyallup Indian Tribe; Suquamish Indian Tribe; Swinomish Indian Tribal Community, Intervenor-Plaintiffs/Petitioners - Appellees,
v.
MUCKLESHOOT INDIAN TRIBE, Intervenor-Plaintiff/Respondent-Appellant,
v.
State of Washington, et al., Defendants.

No. 99-35960.

Argued and Submitted Sept. 12, 2000
Filed Dec. 13, 2000

Before: SCHROEDER, BEEZER, and HAWKINS, Circuit Judges.

MICHAEL DALY HAWKINS, Circuit Judge:

This appeal concerns the limits of the Muckleshoot Tribe's saltwater usual and accustomed fishing area under the Boldt Decision. Because we agree with the district court that the Muckleshoot's saltwater usual and accustomed fishing area, as found by Judge Boldt, was limited to Elliott Bay, we affirm the grant of summary judgment for the Puyallup, Suquamish, and Swinomish Tribes.

BACKGROUND AND PROCEDURAL HISTORY

This case centers on the interpretation of a lengthy and detailed district court opinion published in 1974 after an

extensive trial involving a voluminous record. In *United States v. Washington,* 384 F. Supp. 312 (W.D.Wash. 1974) ("the Boldt Decision"), *aff'd,* 520 F.2d 676 (9th Cir. 1975), Judge Boldt adjudicated the treaty-reserved fishing rights of several tribes in Washington state, including the parties to this dispute. Central to this case is Finding of Fact 76 ("Finding 76") of the opinion, which states:

> Prior to and during treaty times, the Indian ancestors of the present day Muckleshoot Indians had the *usual and accustomed* fishing places primarily at locations on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar, and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek and Newaukum Creek) and Lake Washington, *and secondarily in the saltwater of Puget Sound.* Villages and their weir sites were often located together. [FPTO § 3-53; Ex. USA-20, p. 38; Ex. USA-27b, pp. 7-16; Ex. PL-23, pp. 11- 12]

Id. at 367 (emphasis added) (brackets in original). After the decision was issued, the Muckleshoot Indian Tribe ("the Muckleshoot") opened commercial fisheries in some of the areas designated in Finding 76.

Judge Boldt's decision did not explicitly address shellfish entitlements; rather, it concerned the rights to fin fish. The individual tribes' entitlements to shellfish, which are not at issue here, were addressed in a subsequent case, *United States v. Washington,* 873 F. Supp. 1422 (W.D.Wash. 1994) ("*Washington II*"), *aff'd in part and rev'd in part,* 157 F.3d 630 (9th Cir. 1998).

After *Washington II,* the Muckleshoot sought to open fisheries in Area 11 of Puget Sound. Area 11 is a geographically-defined region of Puget Sound located to the west of the City of Seattle. Area 11, as a fishing zone, was not defined at the time of Boldt Decision; it was subsequently established by state regulation. In response to this action by

the Muckleshoot, the Puyallup Indian Tribe ("the Puyallup") filed a Request for Determination in district court. The Request sought a determination that the Muckleshoot's usual and accustomed ("U&A") saltwater fishing area, as determined by Finding 76 of the Boldt Decision, does not include any areas outside Elliott Bay (now known as Area 10A, like Area 11 a fishing region created by state regulation). With the court's permission, the Suquamish Indian Tribe ("the Suquamish") and the Swinomish Indian Tribal Community ("the Swinomish") filed a Cross-Request for Determination seeking a similar ruling.

In January 1998, the Muckleshoot filed a Motion to Dismiss the Request and the Tribes (the Puyallup, Suquamish, Swinomish) filed a Motion for Summary Judgment on their Requests for Determination. On August 5, 1998, the district court granted the Muckleshoot's motion to dismiss with respect to the Tribes' claims that the Muckleshoot had no saltwater fishing rights outside Areas 9, 10, and 11. The court reasoned that it did not have jurisdiction over areas other than Areas 9, 10, and 11 because the Muckleshoot had not manifested an intent to conduct saltwater fishing in Areas other than 9, 10, and 11. The court then denied the Tribes' motion for summary judgment and ordered an evidentiary hearing on whether Areas 9, 10, and 11 were part of the Muckleshoot's U&A under Finding 76 of the Boldt Decision.

Both parties filed Cross-Motions for Summary Judgment. On September 10, 1999, the district court held that the Muckleshoot's U & A under Finding 76 was limited to Elliott Bay (Area 10A) and enjoining the Muckleshoot from fishing in Areas 9, 10, and 11. The Muckleshoot appealed. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1).[1]

---

[1] The district court did not certify its judgment as a final order under Fed. R. Civ. P. 54(b). The matter before the court was a subproceeding and the

(continued...)

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. *See, e.g., Robi v. Reed,* 173 F.3d 736, 739 (9th Cir. 1999), *cert. denied,* 528 U.S. 952 (1999). This court must determine, viewing the evidence in the light most favorable to the appellants, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *See, e.g., Berry v. Valence Tech., Inc.,* 175 F.3d 699 (9th Cir. 1999), *cert. denied,* 528 U.S. 1019 (1999). The court does not weigh the evidence or determine the truth of the matter; rather, the court only decides whether there is a genuine issue of material fact for trial. *See Colacurcio v. City of Kent,* 163 F.3d 545, 549 (9th Cir. 1998).

ANALYSIS

I. Ambiguity in Finding 76

This case turns on the interpretation of the phrase "secondarily in the waters of Puget Sound" as used by Judge Boldt in Finding 76. The case, therefore, resembles one of statutory construction, with the Boldt Decision serving as the instrument to be interpreted. The Muckleshoot's argument is essentially one of plain meaning. According to the Muckleshoot, the text of Finding 76 is unambiguous because "Puget Sound" has a well-understood, common geographical meaning. If Judge Boldt, who was intimately familiar with the geography of the region and its relevance to the case, meant to confine the Muckleshoot's saltwater U&A to inner Elliott Bay,

---

[1] (...continued)
court's judgment was final as to the issues in the subproceeding. *See Van Cauwenberghe v. Biard,* 486 U.S. 517, 521-22 (1988) (stating that final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment") (internal quotation marks omitted). Jurisdiction under section 1291 is therefore proper. Jurisdiction also lies under § 1292(a)(1) to review the district court's award of injunctive relief.

the Muckleshoot contend Judge Boldt could have expressly done so in Finding 76.

The Tribes counter that the phrase is ambiguous when examined in the context of the evidence before Judge Boldt. Given the evidence that Judge Boldt relied upon and other Findings of Fact and Law in the opinion, the Tribes argue that Judge Boldt could not have intended to include the expansive area claimed by the Muckleshoot as part of their saltwater U&A. *Cf. Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999) ("To determine the plain meaning of a statutory provision, we examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy.").

The parallels between this case and one of statutory construction should not be overemphasized. There are important distinctions between interpreting a judicial opinion and a statute. First, the documents and the evidence the court relied upon, which are the rough equivalent of legislative history, play a much larger and more definitive role in interpreting the judicial text than do the traditional components of legislative history in statutory interpretation. Finding 76 specifically cites the supporting documents used as the bases for its conclusions. There is no question, then, that the court relied upon this information in reaching its decision. Moreover, in referencing the documents cited in Finding 76, Judge Boldt said, "The court finds that in specific facts, the reports of Dr. Barbara Lane, Exhibits USA-20 to 30 and USA-53, have been exceptionally well researched and reported and are established by a preponderance of the evidence. They are found to be authoritative and reliable summaries of relevant aspects of Indian life in the case area at and prior to the time of the treaties. . . ." *Washington*, 384 F. Supp. at 350.

More importantly, judicial opinions are simply not statutes and the rules governing the interpretation of the two reflect this. In general, there are no canons of construction for the

interpretation of opinions, reflecting the fact that textual precision, while a highly valued judicial quality, is at the very center of statutory interpretation. *See, e.g., United States v. Partlow*, 159 F.3d 1218, 1219 (9th Cir. 1998) (where the terms of a statute are unambiguous, its plain meaning must control).

Opinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis. Acknowledging this fact, this court held long ago that the "language of the court must be read in the light of the facts before it." *Julian Petroleum Corp. v. Courtney Petroleum Co.*, 22 F.2d 360, 362 (9th Cir. 1927); *see also Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932) ("[T]he language of all cases must be taken and understood in light of the facts of the case in which the language was employed.").

With these concepts in mind, the parties' debate over whether the language of Finding 76 is unambiguous is largely misdirected, inasmuch as an analysis of the decision is necessary, whether the text is unambiguous or not, in order to understand Finding 76 "in light of the facts of the case." An unambiguous text is certainly a factor to be considered in this analysis, but it does not necessarily terminate the inquiry.

Our decision in *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998), supports this proposition. There, this court did not merely rely on what appeared to be unambiguous language, the meaning of "Whidbey Island," in a previous judicial finding also authored by Judge Boldt. Rather, the court went beyond the plain language and examined the evidence, concluding that the Swinomish Tribe "offered no evidence that suggests that [the Finding of Fact] is ambiguous or *that the court intended something other than its apparent meaning*." *Id.* at 1358 (emphasis added).

As the district court recognized in this case, the Tribes have brought forth precisely such evidence. We agree with the district court's conclusion:

> [T]he evidence before Judge Boldt establishes, at a minimum, that the Muckleshoot's predecessors may have occasionally fished in the open waters of Elliott Bay near the mouth of the Duwamish and gathered shellfish on the shores of Elliott Bay. Based on this evidence, the court concludes that Judge Boldt intended to include those areas (Department of Fisheries Area 10A) in the Muckleshoot U&A. . . . The court finds, however, that there is [sic] no evidence in the record before Judge Boldt, nor is it persuaded by extra-record evidence, that Judge Boldt intended to describe a saltwater U&A any larger than the open water and shores of Elliott BayThe court agrees with the Muckleshoot that Judge Boldt's use of a broad term like "Puget Sound" is perplexing in light of the geographic precision he generally used in describing U&As. And it agrees that, as a resident of the Puget Sound area, it is fair to assume that he would not have used the terms "Elliott Bay" and "Puget Sound" interchangeablyHowever, there is no evidence in the record before Judge Boldt that supports a [saltwater] U&A beyond Elliott Bay.

This conclusion is based on our analysis of the information before Judge Boldt. The Muckleshoot's arguments to the contrary are unpersuasive.

II. The Evidence Before Judge Boldt

A. Evidence Referenced by Judge Boldt

As the district court recognized, the most relevant evidence in determining what Judge Boldt intended by the phrase "secondarily in the saltwater of Puget Sound" consists of the four documents referenced in Finding 76. The first document, the final pretrial order, uses language nearly identical to that in Finding 76 and is, therefore, not very helpful.

The second document, Exhibit USA-20, p. 38, is a portion of Dr. Lane's "Conclusions Based on Available Documents and Ethnographic Data." This report, which describes the fishing practices of the Muckleshoot's ancestors, who signed the treaty Judge Boldt was interpreting, concludes that "[t]he principle fisheries of the ancestors of the Muckleshoot both prior to and during treaty times included Green River, White River, Stuck River, Cedar River, and tributary creeks."

The third document, Exhibit USA-27b, pp. 7-16, provides an extensive discussion of the fishing practices of the Muckleshoot's ancestors. The relevant portion of the discussion states:

> The traditional fisheries of the [ancestors of the] Muckleshoot included but were not limited to Puyallup and Carbon Rivers and tributary creeks; the Stuck, White, Green and Cedar rivers and tributary creeks; and Lake Washington. In addition there was some trolling for salmon in salt waters when families descended the rivers to get shell fish supplies on the beaches of the Sound.

The last document listed in Finding 76 is Exhibit PL-23, pp. 11-12, a portion of a report of Dr. Carroll Riley. The report describes the area where the Muckleshoot's ancestors lived and, like the other documents, concludes that the ancestor tribes relied primarily on freshwater fishing: "[T]he Indians in this area obtained the greatest part of their subsistence from fish caught in the White and Green Rivers. . . . They occasionally made the trip down river to Elliott Bay on fishing and clamming expeditions."

These documents indicate that the Muckleshoot's ancestors were almost entirely an upriver people who primarily relied on freshwater fishing for their livelihoods. Insofar as they conducted saltwater fishing, the referenced documents contain no evidence indicating that such fishing occurred with regularity anywhere beyond Elliott Bay.

This conclusion is buttressed by other evidence before Judge Boldt. The reports that Judge Boldt relied upon make a general distinction between downriver predecessor tribes, also referred to as saltwater tribes, and upriver tribes. The predecessor tribes to the Muckleshoot were considered to be upriver tribes. In an excerpt from the anthropological report of Dr. Lane, the Muckleshoot's ancestors are described as having "lived in treaty times in about twenty villages on the Duwamish and upper Puyallup drainage systems." These ancestors, according to Dr. Lane, were " 'upriver' people in contrast to those people living directly on the bays and lower reaches of the river."

The Muckleshoot's ancestors may have occasionally conducted saltwater fishing beyond Elliott Bay. But it is important to remember that Judge Boldt was deciding the "usual and accustomed" fishing grounds under the provisions of the Treaties. Isolated or infrequent excursions beyond Elliott Bay do not meet the "usual and accustomed" standard.[2]

---

[2] Explaining the scope of "usual and accustomed," Judge Boldt said:

> Although there is no evidence of the precise understanding the Indians had of the treaty language, the treaty commissioners probably used the term [ ] "usual and accustomed" . . . in [its] common parlance, and the meaning of [it] as found in a contemporaneous dictionary most likely would be what was intended by the government representatives. The 1828 and 1862 editions of Webster's American Dictionary of the English Language define the term as follows: accustomed: Being familiar by use; habituated, inured . . . usual; often practiced . . .
>
> usual: Customary; common; frequent; such as occurs in ordinary practice or in the ordinary course of events.
>
> . . . The words "usual and accustomed" were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental.
>
> *Washington*, 384 F. Supp. at 356.

(continued...)

The documents listed in Finding 76 do not indicate the existence of saltwater fishing beyond Elliott Bay that was more than "incidental" or "occasional."

B. The Muckleshoot's Arguments

The Muckleshoot's argument that their ancestors conducted saltwater fishing beyond Elliott Bay rests on four pieces of evidence: (1) Dr. Lane's reports; (2) Dr. Carroll Riley's report; (3) excerpts from a book by the anthropologist Marian Smith; and (4) testimony of Puyallup tribal members given before the Indian Claims Commission ("ICC") in the 1950s None of these establishes that the Muckleshoot's ancestors had U&A fishing grounds beyond Elliott Bay.

1. Dr. Lane's Reports

a. Exhibit USA-27b

The Muckleshoot contend that Exhibit USA-27b is the key document for the purpose of ascertaining the intended scope of the phrase "secondarily in the saltwater of Puget Sound." The Muckleshoot first argue that the report's statement that "there was some trolling for salmon in salt water when families descended the rivers to get the shell fish supplies on the beaches of the sound" is regional in scope and broader than Elliott BayJudge Boldt adapted the phrase "on the beaches of Puget Sound," the Muckleshoot contend, to mean "in the saltwater of Puget Sound" to conform with the description of the trolling in Dr. Lane's report and to emphasize the inclusion of waters in Puget Sound and not merely the beaches. The Muckleshoot also argue that the phrase "the beaches of Puget Sound" has a plain meaning which is broader than Elliott Bay and that Dr. Lane did not mention Elliott Bay at all in her description of the Muckleshoot's saltwater U&A.

---

[2] (...continued)

Addressing the last point first, the lack of a discussion of Elliott Bay in Dr. Lane's report works against the Muckleshoot's argument, not for it. Dr. Lane's report lists the saltwater U&As for those tribes that she believed engaged in significant saltwater fishing. The only tribes for which there is no mention of specific saltwater fisheries are three upriver tribes, including the Muckleshoot. This feature of the report suggests two conclusions—(1) the phrase "on the beaches of Puget Sound" was used because there was no established (*i.e.* U&A) saltwater fishing location anywhere and (2) the omission of "Puget Sound" from Dr. Lane's findings in Exhibit USA-20, which lists the principal fisheries of the Muckleshoot's ancestors, was not inadvertent or inconsequential. Rather, it suggests that Puget Sound was not a principal saltwater fishing ground.

More importantly, all references in Dr. Lane's report on Muckleshoot saltwater fishing only pertain to saltwater fisheries in the Duwamish drainage system. The Duwamish empties only into Elliott Bay. Nowhere in Dr. Lane's report is there a reference to the Muckleshoot's ancestors fishing on a drainage system that empties anywhere outside Elliott Bay.

The only other reference to saltwater in Dr. Lane's report is the statement, in Exhibit USA-27b and listed in Finding 76, "In addition, there was some trolling for salmon in salt water when families descended upon the rivers to get shell fish supplies on the beaches of the sound." This statement does not establish that the Muckleshoot's ancestors had any saltwater U&A outside Elliott Bay. The rivers that the families "descended upon" are those referenced in the preceding sentence—the Puyallup, Carbon, Stuck, White, Green, and Cedar. At the time of the treaty, the White, Green, and Cedar rivers flowed into the then-existent Black River which became the Duwamish River and emptied into Elliott Bay. This is consistent with Dr. Lane's use of the term "Duwamish drainage system" throughout her report. The

"beaches of Puget Sound" that the Muckleshoot's ancestors would reach after descending the White, Green, and Cedar rivers were the beaches of Elliott Bay and those beaches alone.

Of the remaining rivers, the Stuck flowed south from the White River and into the Puyallup and the Carbon River was a tributary of the upper PuyallupAt treaty time, the lower Puyallup was within the territory of the Puyallup Tribe and the Muckleshoot's ancestors could not have descended all the way down the Puyallup River without entering Puyallup territory Because these fishing grounds "on the beaches of Puget Sound" are within the exclusive territory of the present-day Puyallup Reservation, the Muckleshoot cannot claim them as part of their U&A territory.[3] Thus the only referenced rivers that are not part of the Duwamish drainage system cannot yield the Muckleshoot saltwater U&A rights.[4]

b. Seasonal Fishing

Dr. Lane's report, cited as Exhibit USA-27a, explains that the villages of the Muckleshoot's ancestors "were only occupied by the entire village group during the winter season At other times of the year, portions of the population decamped in different directions to secure food and other supplies." Judge Boldt recognized this when he wrote, "[M]ost groups claimed autumn fishing use rights in the waters near to their winter villages. Spring and summer fishing areas were often more distantly located and often were shared with other groups from other villages." *Washington,*

---

[3] "An exclusive right of fishing was reserved by the tribes within the area and boundary waters of their reservations." *Washington,* 384 F. Supp. at 332.

[4] The Muckleshoot contend that it is relevant that the Puyallup Reservation did not exist before the treaties. This point is irrelevant to Judge Boldt's determination that exclusive fishing rights exist on present-day reservations.

384 F. Supp. at 353. The facts before Judge Boldt show that the Muckleshoot's ancestors did not regularly fish outside Elliott Bay, even during the spring and summer fishing seasons.

First, the above statements contained in Exhibit USA-27b were not specifically referenced in Finding 76, so their relevance should not be overemphasized. More importantly, the evidence cited by the Muckleshoot does not establish that any seasonal saltwater fishing areas beyond Elliott Bay were used by their ancestors with enough regularity to establish them as U&A grounds. *See also Washington*, 384 F. Supp. at 351 (Finding 14) ("Marine waters were also used as thoroughfares for travel by Indians who trolled en route. Such occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the traveling Indians.") (internal exhibit references omitted).

c. Specific Sites Listed in Dr. Lane's Report

The Muckleshoot claim that Appendix 2 to Dr. Lane's report, which contains excerpts from T.T. Waterman's manuscript describing field work done from 1917 through 1920, contains information on sites beyond Elliott Bay where the Muckleshoot's ancestors fished. But the excerpts in Appendix 2 can only be understood with reference to Waterman's findings in Appendix 1. In his listing of "Duwamish Villages on the eastern side of the Sound," Waterman lumped together both upriver and downriver (or saltwater) tribes. Dr. Lane, however, made a distinction between the two groups, finding that the downriver tribes were not ancestors of the Muckleshoot. Thus, it cannot be said that the sites listed in Appendix 2 were fishing grounds of the Muckleshoot's ancestors.

Moreover, Appendix 1 contains a list, selected by Dr. Lane from Waterman's manuscripts, of place names used by

treaty-time bands, including the ancestors of tribes other than the Muckleshoot. The list does not include any saltwater sites Finally, Appendix 1 contains a map of Muckleshoot fishing cities. This map only includes sites on rivers; there are no saltwater sites marked. Given this background, that Appendix 2 does not specifically identify the Muckleshoot ancestor sites, and that the evidence contained in Appendix 2 is only briefly mentioned in Dr. Lane's reports, the Muckleshoot have failed to demonstrate that the evidence established treaty-time saltwater U&As beyond Elliott Bay.

The Muckleshoot also claim that another appendix to Dr. Lane's report, a statement by the anthropologist Marian Smith that people from the upper Puyallup valley made "special trips to the Sound in the neighborhood of what is now Redondo Beach" to catch devil fish, supports their reading of Finding 76. The excerpt states that the devil fish, i.e., octopi, were not fished. Rather, "[t]hey were picked up while asleep along the shore. . . ." Consequently, the excerpt does not establish a basis for a saltwater U&A at Redondo Beach even if the Muckleshoot's ancestors engaged in this form of collection.

2. Dr. Riley's Report (Exhibit PL-23)

Dr. Riley's report, which was cited in Finding 76, says that the Muckleshoot's treaty-time ancestors "occasionally made the trip down-river to Elliott Bay on fishing and clamming expeditions." The Muckleshoot argue that this statement means that Judge Boldt implicitly rejected limiting the saltwater U&A to Elliott Bay and chose instead a much broader area. If Judge Boldt had intended to define the U&A as Elliott Bay, the Muckleshoot contend, then he could have done so very simply and Dr. Riley's report would have provided the evidentiary basis for such a finding.

The Muckleshoot are correct when they contend that Judge Boldt specifically said that Dr. Lane's testimony prevails over

Dr. Riley's in the event of a conflict between the two. *See Washington,* 384 F. Supp. at 350. Contrary to the Muckleshoot's assertion, however, there is no conflict between Dr. Lane and Dr. Riley on this matter. As discussed above, Dr. Lane's reference to the "beaches of Puget Sound" does not encompass, based on the evidence, an area beyond Elliott Bay. Even if it did, it would be odd for Judge Boldt to have included a contrary reference, the testimony of Dr. Riley, in Finding 76 for the purpose of implicitly rejecting it.

3. ICC Testimony

The Muckleshoot point to the findings of fact made by the ICC in 1966 in a case involving the Puyallup Tribe. The ICC found that the testimony before it "tend[ed] to show" that the "islands in southern Puget Sound" were used jointly by a number of treaty-time tribes, including the ancestors of the Muckleshoot. The Muckleshoot maintain that this finding supports a broad reading of "saltwater of Puget Sound" in Judge Boldt's decision. This is incorrect.

In a post-trial substantive order, Judge Boldt said that an ICC finding in a case involving land claims of the Nooksack Tribe[5] "in no way dealt with asserted Indian treaty fishing rights." *United States v. Washington,* 459 F. Supp. 1020, 1042 (W.D.Wash. 1978). The evidence in the ICC report is insufficient to support a broad reading of Dr. Lane's phrase "the beaches of Puget Sound" or Finding 76's phrase "the saltwater of Puget Sound." Even assuming fishing did take place, there is nothing in the ICC finding to indicate that it met the requirements of "usual and accustomed."

4. Excerpts from Marian Smith's Book

---

[5] The ICC finding relied upon by Muckleshoot also involves a dispute related solely to land claims and not involving fishing.

The Muckleshoot argue that excerpts, introduced at the underlying trial, from Marian Smith's book, *The Puyallup-Nisqually,* also establish that the Muckleshoot's ancestors lived and fished in Puget Sound beyond Elliott Bay. According to Smith, people from the village at the forks of the White and Green rivers came to the area around present-day Redondo Beach to gather shellfish. These Indians included the treaty-time ancestors of the Muckleshoot. *See Washington,* 384 F. Supp. at 366 ("Indians from the Green and White River areas . . . and some Indians from the upriver portions of the Puyallup River . . . were removed and consolidated on the Muckleshoot Reservation.")

This evidence is also insufficient to establish a saltwater U&A beyond Elliott Bay. Smith's account does not establish that the Muckleshoot's ancestors trolled the waters of Redondo Beach. As discussed above, Smith's findings were that these people collected devil fish on the "shores" of Redondo Beach. This finding is not inconsistent with a determination by Judge Boldt that the Muckleshoot's ancestors did not engage in U&A saltwater fishing beyond Elliott Bay.

CONCLUSION

The district court's grant of summary judgment is AFFIRMED.

Appellant Muckleshoot Indian Tribe's Motion for Judicial Notice of Maps and Intervenor-Plaintiffs/Petitioners-Appellees Puyallup Indian Tribe's, Suquamish Indian Tribe's and Swinomish Indian Tribal Community's Motion to Strike are denied as moot.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	NO. C70-9213R Subproceeding 97-1 ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT, DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING SUBPROCEEDING

THIS MATTER comes before the court on the respondent Muckleshoot Tribe's motion for summary judgment and the petitioner Swinomish, Suquamish and Puyallup tribes' ("Three Tribes") cross-motion for summary judgment. The parties seek a ruling on the extent of the Muckleshoot's saltwater fishing rights in Puget Sound. The court has considered the pleadings filed in support of and in opposition to the motions and heard oral argument. Being fully advised, the court grants the Three Tribes' motion for summary judgment, denies the Muckleshoot's motion for summary judgment and dismisses this subproceeding.

I. BACKGROUND

A. Factual Background

The Three Tribes brought this subproceeding asking this court to determine the extent of the Muckleshoot's usual and accustomed (U&A) fishing places under Judge Boldt's Finding

of Fact (FOF) 76. Judge Bolt found that the Muckleshoot's ancestors had the following U&A:

> Prior to and during treaty times the Indian ancestors of the present day Muckleshoot Indians had usual and accustomed fishing places primarily at locations on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek and Newaukum Creek) and Lake Washington, and secondarily in the saltwater of Puget Sound.

United States v. State of Washington, 384 F. Supp. 312, 367 (W.D. Wash. 1974). The Muckleshoot's freshwater fisheries are not in dispute. What is in dispute is whether Judge Boldt intended to designate a saltwater fishery for the Muckleshoot and, if so, what areas he intended "secondarily in the saltwater of Puget Sound" to encompass. The Three Tribes argue that the Muckleshoot's saltwater treaty fishing places under FOF 76 are limited to Elliott Bay (Department of Fisheries Area 10A). They seek a declaratory judgment that the Muckleshoot's U&A does not include waters within Areas 10, 11 or waters west and north of Area 10 and an injunction preventing the Muckleshoot from fishing those areas. The Muckleshoot argue that the term "Puget Sound" cannot be interpreted to limit its fishing area to Elliott Bay and that Judge Boldt intended the phrase "Puget Sound" to include the inside marine waters from Admiralty Inlet to the Tacoma Narrows (Areas 9, 10, 10A and 11). The Jamestown S'Klallam, Lower Elwah S'Klallam, Port Gamble S'Klallam and Skokomish Tribes (referred to collectively as "Jamestown S'Klallam") have filed a response in opposition to the Muckleshoot's motion for summary judgment. The Jamestown S'Klallain propose a third interpretation of FOF 76. They contend that by referring to the Muckleshoot's saltwater fisheries as "secondary," Judge Boldt intended to indicate that those fishing rights were permissive fishing rights in relation to resident primary tribes. They argue that the

Muckleshoot's saltwater fishing should be confined to the eastern shores of Puget Sound south of the northern border of Area 10.

B. Procedural Background

A brief summary of the court's earlier rulings is helpful to understanding the present posture of this controversy. The Three Tribes filed an earlier motion for summary judgment and the Muckleshoot filed a cross motion to dismiss. The Three Tribes also previously filed a motion to strike portions of the Muckleshoot's brief in opposition to their summary judgment motion and two documents in support of that brief: Dr. Barbara Lane's 1998 affidavit and a 1993 shellfish report by Dr. Lane and Lynn Larson. While those motions were pending, the Ninth Circuit Court of Appeals issued an opinion in *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (1998). This court asked the parties to file supplemental briefing to address what, if any, impact the Ninth Circuit's opinion had on the pending motions.

After the parties filed supplemental briefing, this court issued an order granting the Muckleshoot's motion to dismiss in part and granting the Three Tribes' motion to strike in part. In their motion to dismiss, the Muckleshoot had argued with respect to Areas 9, 10 and 11 that the Three Tribes' claim should be dismissed for lack of ambiguity. With respect to areas beyond 9, 10, and 11, the Muckleshoot argued that the claim should be dismissed because the court does not have a continuing jurisdiction over it. The following is a summary of the court's order on those motions:

1. Ambiguity

The Three Tribes contended that the term "Puget Sound" is ambiguous in light of the record. And they argued that Judge Boldt's reference to a primary and secondary dichotomy (in the phrase "secondarily in the saltwater of Puget Sound") renders FOF 76 inherently ambiguous. The court found that

FOF 76 is ambiguous because if is susceptible to more than one interpretation. In addition, the court found that Judge Boldt's use of the term "secondarily" to describe the Muckleshoot's U&A in Puget Sound is ambiguous.

2. Evidence admissible to resolve an ambiguity

After finding that the phrases "Puget Sound" and "secondarily" are ambiguous, the court addressed what evidence would be admissible to resolve the ambiguity. The Three Tribes contended that the Ninth Circuit's *Muckleshoot* opinion foreclosed consideration of evidence that was not in the record before Judge Boldt. They argued that the opinion allows extra-record evidence only if the record does not contain any evidence clarifying the issue before the court and the ambiguity, therefore, cannot be resolved from the record. The Three Tribes argued that the ambiguity in this case can be resolved by reference to the record alone.

At issue in *Muckleshoot* was what Judge Boldt meant in precise geographic terms by his use of the phrase "the present environs of Seattle." The Ninth Circuit held that this court "correctly determined that 'the key to resolving the controversy lies in determining what Judge Boldt meant in precise geographic terms by his use of the phrase "the present environs of Seattle."'" 141 F.3d at 1358. It held, however, that this court erred in concluding that Judge Boldt's intended meaning could be determined by reference to what Dr. Lane later testified *she* intended the phrase to mean in her reports to Judge Boldt. The Ninth Circuit held that Dr. Lane's latter-day testimony is extraneous to the decree and the underlying record and that its admission was in error. It observed, however, that on remand "[i]t will be up to the parties to offer admissible evidence to enable the district court to interpret the decree in specific geographic terms. While evidence that was before Judge Boldt when he made his finding is obviously relevant, there may be *other evidence* indicative of the

contemporary understanding of 'the present environs of Seattle.'" 141 F.3d at 1359 (emphasis added).

This court ruled that since the Ninth Circuit explicitly stated that this court can consider evidence besides evidence before Judge Boldt when he made his finding, this court is not foreclosed from considering extra-record evidence. It is, however, foreclosed from imputing someone else's understanding of a phrase to Judge Boldt. The court further observed that while the evidence before Judge Boldt is unquestionably the most relevant and persuasive in determining his intention, the court does not need to make a separate inquiry to determine if it can go outside the record in the first place.

The court granted in part the Three Tribes' motion to strike portions of the Muckleshoot's brief, appendix and affidavit of Barbara Lane. The court ruled it would consider extra-record evidence as long as it is relevant to determining Judge Boldt's intention.

3. Continuing jurisdiction (Areas beyond 9, 10, 11)

In *Muckleshoot*, the Lummi were currently taking fish in the disputed area. The Ninth Circuit remanded with instructions to proceed under subparagraph 25(a) of the injunction in *United States v. Washington* because the court was presented with a controversy over whether a party's actions were in conformity with the injunction. 384 F. Supp. at 419. In previous plead-ings, the Muckleshoot represented that they have no present intention of fishing in areas beyond Areas 9, 10, and 11. They argued that this court could not make a decision under subparagraph (a) about whether their actions in areas beyond Areas 9, 10, and 11, are "in conformity with" the injunction because they are not currently fishing in those areas nor do have they have a present stated intention to fish in those areas. This court agreed, finding that since the Muckleshoot do not intend to fish in those areas, the petitioners' claim does

not require a determination as to whether "actions, intended or effected by any party" are in conformity with the permanent injunction with respect to those areas. This court concluded that, pursuant to the Ninth Circuit's opinion in *Muckleshoot*, it did not have jurisdiction under subparagraph (a) to resolve the petitioners' claims with respect to Areas outside 9, 10, and 11. The court, therefore, granted the Muckleshoot's motion to dismiss with respect to areas beyond Areas 9, 10, and 11. Accordingly, those areas are not at issue in these cross motions.

II. DISCUSSION

The following facts are undisputed: At treaty time, the Muckleshoot's predecessors were upriver Indians with fisheries primarily in the Duwamish and upper Puyallup drainage systems. The Muckleshoot lived on the Duwamish and upper Puyallup drainage systems; they did not live directly on the bays and lower reaches of the rivers. There is evidence in the record before Judge Boldt that the Muckleshoot descended the rivers to fish in Elliott Bay and used the beaches of Puget Sound to gather shellfish supplies. At issue is what, if any, Muckleshoot saltwater U&A Judge Boldt intended to designate in FOF 76.

The Muckleshoot argue that by using the phrase "Puget Sound" without limitation, Judge Boldt intended to include at least the area from Admiralty Inlet (Area 9) to the Tacoma Narrows (Area 11). The Three Tribes contend there is no evidence in the record that the Muckleshoot ever fished in saltwater beyond Elliott Bay; and, thus, there is no evidence in the record from which to infer that Judge Boldt intended to designate a Muckleshoot fishery beyond Elliott Bay. The Jamestown S'Klallam argue that the Muckleshoot saltwater U&A should be confined to the shoreline, because there is no evidence in the record that they fished in the open water. Specifically, the Jamestown S'Klallam argue that the Muckleshoot fishery is limited to the eastern shores of Puget

Sound south of the northern border of Area 10. They further argue that by using the term "secondarily," Judge Boldt intended to designate only a permissive fishery, i.e. one only allowed when permitted by the resident primary tribes of the area.

The parties agree that the Muckleshoot have at least some fishing rights in Elliott Bay (Area 10A). What they do not agree on is what is the extent of those rights, more particularly: 1) whether the Muckleshoot have saltwater fishing rights that extend beyond Elliott Bay; 2) if their saltwater fishing rights are constrained by the phrase "secondarily" and 3) if their saltwater fishing rights are limited to the shoreline, or whether they include fishing on the open water.

A. Evidence relied on by Judge Boldt

As the court noted in its previous order, although it may consider evidence that was not before Judge Boldt, obviously the evidence most relevant in determining what Judge Boldt intended by the phrase "secondarily in the saltwater of Puget Sound" is the record evidence to which he cited. Thus, the court's starting point in this inquiry is a review of that evidence before Judge Boldt to determine whether it resolves the ambiguity in the phrase at issue. In FOF 76, Judge Boldt cited to four items: 1) the parties' final pretrial order; 2) the Summary Anthropological Report of Barbara Lane; 3) Anthropological Report on the Traditional Fisheries of the Muckleshoot Indians by Barbara Lane; and 4) the Report from Carroll Riley, Anthropologist.

1. Final Pretrial Order

The text of this section is almost identical to that of FOF 76 and is, therefore, unhelpful in determining Judge Boldt's intent PTO at § 3-53 [docket 353].

2. Summary anthropological Report of Barbara Lane

The text of the relevant section of Dr. Lane's summary states:

> The principal fisheries of the ancestors of the Muckleshoot both prior to and during treaty times included Green River, White River, Stuck River, Cedar River, and tributary creeks.

USA 20 at 38.

3. Anthropological Report on the Traditional Fisheries of the Muckleshoot Indians by Barbara Lane

The relevant portion of this report states:

> The traditional fisheries of the Muckleshoot included but were not limited to Puyallup and Carbon rivers and tributary creeks; the Stuck, White, Green and Cedar rivers and tributary creeks; and Lake Washington. In addition, there was some trolling for salmon in salt water when families descended the rivers to get shell fish supplies on the beaches of the Sound.

USA 27b at p. 7.

4. Report from Carroll Riley

Riley's report concurs with Lane's report regarding the traditional fishing areas of the Muckleshoot predecessor tribes. Relevant to the issue here, Riley's report states at page 12:

> According to informants, the Indians in this area obtained the greatest part of their subsistence from fish caught in the White and Green Rivers, although some hunted sporadically (especially the villagers from S'bae'quabsh [a predecessor tribe]) in the foothills of the Cascades. *They occasionally*

made the trip downriver to Elliott Bay on fishing and clamming expeditions.

PL-23 at 12 (emphasis added).

B. Evidence relied on by the Muckleshoot

In addition to the evidence cited to by Judge Boldt, the Muckleshoot rely on the following documents: 1) Exhibits G-17(a) and G-17(e) - Indian Claims Commission (ICC) Findings of Fact for Duwamish Tribe and Puyallup Tribe, respectively; 2) Exhibit G-27 "The Puyallup-Nisqually" by Marion Smith; 3) Exhibit PL-73 - a map overlay that was used in Judge Boldt's courtroom in *United States v. Washington*; and 4) the declaration of Richard L. Morrill.[1] For the reasons discussed below, the court does not find these items helpful or persuasive in resolving the issue before it.

1. ICC Findings of Fact

The Muckleshoot rely on the Puyallup proceeding before the ICC. In its findings for that proceeding, the ICC noted that the evidence before it tended to show joint use by the Puyallup and other tribes, including the Muckleshoot, of certain areas in the Puget Sound, "including those areas lying on the islands in southern Puget Sound." G-17(e) at 12. The Muckleshoot also rely on the Duwamish proceeding for the proposition that the ICC confirmed a joint use on the shoreline of Puget Sound by limiting the Duwatnish territorial claim. G-17 (a) at 5-131.

The court finds that the ICC documents are not helpful to determining Judge Boldt's intent. Judge Boldt himself determined that these documents should be given very little weight in determining U&As because the focus of ICC proceedings was entirely different:

---

[1] Morrill's declaration is extra-record evidence.

> Proceedings before the . . . Indian Claims Commission dealt with compensation claims for tribal lands taken by the United States, and in no way dealt with asserted Indian treaty fishing rights. Certain historical and anthropological evidence presented for consideration . . . in this case, which evidence was not rebutted by the defendant State of Washington, was not available to the Indian Claims Commission.

United States v. Washington, 459 F. Supp. 1020, 1042 (W.D. Wash. 1978). Furthermore, the ICC document in the Duwamish proceeding does not make any reference to other tribes besides the Duwamish and the court finds that it does not support the Muckleshoot's argument at all.

2. "The Puyallup-Nisqually" by Marion Smith

In his book, Smith wrote that large groups from several upriver bands in the Puget Sound area undertook expeditions for shellfish "regularly in summer." Ex. G-27 at 26. "They followed the drainage systems only in a very broad sense and the grounds used simultaneously by family groups from different villages were those which are usually called 'lands in common.'" *Id.* He also notes that these bands used eight regions for joint summer expeditions including: Rodondo Beach, Vashon Island, Colvos Passage, Fox Island, Anderson Island, the Mouth of the Nisqually, Squakson Island and the East side of Harstene Island. Although Smith refers to upriver bands, he does not refer to the Muckleshoot specifically in this excerpt. The court, therefore, finds this excerpt unhelpful it determining Judge Boldt's intent.

3. Map overlay

The Muckleshoot make an argument based on an overlay to the map that was in Judge Boldt's courtroom showing areas in the Puget Sound designated to other tribes. They argue that by elimination, an area on the overlay north the Puyallup and south of the Lummi U&A "was probably perceived by Judge

Boldt to represent Muckleshoot fishing places." This area includes Elliott Bay, Shilshole Bay, Port Madison, and waters of Puget Sound between Seattle and Bainbridge Island. There is no evidence, however, to support their contention that areas that did not specifically fall within other tribes' Puget Sound U&As oh the map, by elimination, fell within a predecessor tribe's U&A. Thus, the court does not consider exhibit PL-73 indicative of Judge Boldt's intent.

4. Morrill Declaration

Morrill is a geography professor. His opinion is that the most restrictive use of "Puget Sound" is understood to encompass the marine waters from Admiralty Inlet south. The Muckleshoot have submitted three marine charts showing the location of Puget Sound described by cartographers, which corresponds to Morrill's opinion. The Muckleshoot have moved the court to take judicial notice of the charts, which is opposed by the Three Tribes. Contrary to what the Muckleshoot argue, this court can only take judicial notice of facts not in dispute. It cannot take judicial notice of charts or maps where the geographical facts at issue are in dispute. *See Muckleshoot*, 141 F.3d at 1358 n.4. Thus, the court declines to take judicial notice of the charts.

The court, furthermore, is unpersuaded that Morrill's opinion on the contemporary meaning of "Puget Sound" is helpful in resolving this motion. This court's task is to determine the U&A Judge Boldt intended to designate in FOF 76. Although it is Morrill's opinion that a Contemporary speaker would have intended "Puget Sound" to refer to the areas described above, in the context of this case, the court finds it is obvious Judge Boldt did not intend to designate such a vast area as the Muckleshoot U&A. The court could only conclude that Judge Boldt used "Puget Sound" in FOF 76 in the manner described by Morrill by grossly contorting the evidence and the history of this case.

In light of the other U&As Judge Boldt delineated, it is inconceivable to the court that he would intend to give the Muckleshoot, an upriver people, a vast saltwater U&A stretching from the Tacoma Narrows to Admiralty Inlet and overlapping the U&As of tribes with a documented history of open water fishing in the same areas. The evidence in the record is that the Muckleshoot's predecessors were upriver Indians with fisheries primarily in the freshwater of the Duwamish drainage who descended to fish at the river's mouth in Elliott Bay. There is no evidence that the Muckleshoot fished in the open marine waters beyond Elliott Bay. Furthermore, there is no evidence that the Muckleshoot possessed the technology to fish on the open waters of Puget Sound. There is, for example, no evidence that the Muckleshoot ever used anything other than the shovelnose river canoe which was unsuitable for extended open water fishing. According to Marion Smith, inland peoples "made and used only [the] shovel-nose type [canoe] . . . [which] was used only on rivers above the tide flats." Ex. 33 at 289.[2] Thus, the court is persuaded that Judge Boldt could not have intended the Muckleshoot's U&A to include the open waters of Puget Sound as Professor Morrill uses that term.

C. Muckleshoot saltwater U&A

1. Boundaries

It is clear from the documents Judge Boldt specifically cited to that the predecessors of the Muckleshoot were a primarily upriver people who may have, from time to time, descended to Elliott Bay to fish and collect shellfish there. The court finds that the evidence before Judge Boldt establishes, at a minimum, that the Muckleshoot's predecessors may have

---

[2] Ex. 33 is the subject of the Muckleshoot's motion to strike evidence. The objection is not well .taken considering the Muckleshoot also rely on parts of Smith's book in support of their summary judgment motion.

occasionally fished in the open waters of Elliott Bay near the mouth of the Duwamish and gathered shellfish on the shores of Elliott Bay. Based on this evidence, the court concludes that Judge Boldt intended to include those areas (Department of Fisheries Area 10A) in the Muckleshoot U&A. In light of the evidence before Judge Boldt that the Muckleshoot did fish in the open waters of Elliott Bay,[3] the court rejects the Jamestown S'Klallam's argument that the Muckleshoot U&A should be limited to the shoreline.

The court finds, however, that there is no evidence in the record before Judge Boldt, nor is it persuaded by extra-record evidence, that Judge Boldt intended to describe a saltwater U&A any larger than the open waters and shores of Elliott Bay. The court agrees with the Muckleshoot that Judge Boldt's use of a broad term like "Puget Sound" is perplexing in light of the geographic precision he generally used in describing U&As. And it agrees that, as a resident of the Puget Sound area, it is fair to assume that he would not have used the terms "Elliott Bay" and "Puget Sound" interchangeably. However, there is no evidence in the record before Judge Boldt that supports a U&A beyond Elliott Bay. In the court's view, Judge Boldt probably did not use a great deal of precision in describing the Muckleshoot's saltwater U&A since the saltwater U&A was clearly not the main focus of FOF 76 and was only of secondary importance in relation to the Muckleshoot's river U&As, which are described in great detail in FOF 76.

2. Primary/secondary distinction

As noted above, the Jamestown S'Klallaxn argue that by using the term "secondarily" Judge Boldt intended to designate

---

[3] The court refers specifically to the reports of Barbara Lane, USA 27b, and Carroll Riley, PL-23, both of which refer to fishing and/or trolling expeditions as well as shellfish gathering.

only a permissive fishery, i.e. one only allowed when permitted by the resident primary tribes of the area. The court rejects this argument because the court finds nothing in the evidence before Judge Boldt or in his opinion in *United States v. Washington* that supports this interpretation. Furthermore, it is illogical to assume that Judge Boldt would have included an area in a finding of fact designating a "usual and accustomed" fishing ground if he only meant to indicate that the area was a permissive fishing ground. In other words, if a fishing area was really only permissive, by definition it would not be a usual and accustomed fishing ground. Finally, had Judge Boldt intended to designate merely a permissive fishing ground, he would have used the term "permissive" instead of "secondarily" as he did in FOF 12.[4] The court concludes that, in light of the evidence before him, Judge Boldt intended to use "secondarily" in an ordinary, or common sense manner to indicate that the saltwater U&A was of minor or lesser importance. He did riot, the court concludes, intend to restrict the U&A through this observation.

CONCLUSION

The court grants the Three Tribes' motion for summary judgment [docket 119-1), denies the Muckleshoot's motion for summary judgment [docket 114-1], denies the Muckleshoot's motion to strike [125-1] and dismisses this subproceeding. The court finds that respondent's U&A is limited to Department of Fisheries Area 10A and hereby enjoins respondent from fishing in Department of Fisheries Area 9, 10, and 11.

---

[4] FOF 12 explains ". . . Generally, individual Indians had primary use rights in the territory where the resided and permissive use rights in the natal territory (if this was different) or in the territories where they had consanguineal kin." *United States v. Washington*, 384 F. Supp. at 353.

DATED at Seattle, Washington this 9th day of September, 1999.

*/s/*_____
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, ET AL	JUDGMENT IN A CIVIL CASE
v.	CASENUMBER: C70-9213/**Subproceeding #97-1**
STATE OF WASHINGTON, ET AL	

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The court grants the Swinomish, Suquamish, and Puyallup Tribes' motion for summary judgment and denies the Muckleshoot Tribe's motion for summary judgment. Judgment is entered in favor of the Swinomish, Suquamish, and Puyallup Tribes and the subproceeding is dismissed. The Muckleshoot Tribe's U&A is limited to Department of Fisheries Area 10A and the Muckleshoot Tribe is hereby enjoined from fishing in Department of Fisheries Areas 9,10 and 11.

September 16, 1999 BRUCE RIFKIN
Clerk

/s/
By Nealann J. Skari, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	NO. No. 9213 - Phase I Subproceeding 97-1 ORDER GRANTING RESPONDENT'S MOTION TO DISMISS IN PART, GRANTING PETITIONERS' MOTION TO STRIKE IN PART AND SCHEDULING PRETRIAL CONFERENCE

I. BACKGROUND

The Swinomish, Suquamish and Puyallup (three Tribes) have asked the court to interpret Judge Boldt's Finding of Fact (FOF) 76. FOF 76 defines the Muckleshoot's usual and accustomed fishing places (U&A):

> Prior to and during treaty times, the Indian ancestors of the present day Muckleshoot Indians had usual and accustomed fishing places primarily at locations on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek and Newaukum Creek) and Lake Washington, and secondarily in the saltwater of Puget Sound.

United States v. State of Washington, 364 F. Supp. 312, 367 (1974). In dispute is what areas Judge Boldt intended "Puget Sound" to encompass. The three Tribes argue that the Muckleshoot's saltwater treaty fishing places under FOF 76 are limited to Elliott Bay. They seek a declaratory judgment that the Muckleshoot's U&A does not include waters within

Department of Fisheries Areas 10, 11, or waters West and North of Area 10 and an injunction preventing the Muckleshoot from fishing those areas. The Muckleshoot argue that the term "Puget Sound" cannot be interpreted to limit its fishing area to Elliott Bay and that Judge Boldt intended the phrase "Puget Sound" to include the inside marine waters from the Canadian border to Olympia in the Muckleshoot's U&A.

The three Tribes have filed a motion for summary judgment. The Muckleshoot have filed a cross motion to dismiss. The three Tribes have also filed a motion to strike portions of the Muckleshoot's brief in opposition to their summary judgment motion and two documents in support of that brief: Dr. Barbara Lane's 1998 affidavit and a 1993 shellfish report by Dr. Lane and Lynn Larson. While these motions were pending, the Ninth Circuit Court of Appeals issued an opinion in *Muckleshoot Tribe v. Lummi Indian Tribe*, 142. F.3d 1355 (1998). This court asked the parties to file supplemental briefing to address what if any impact the Ninth Circuit's opinion had on the pending motions.

II. DISCUSSION

A. Ninth Circuit's Muckleshoot Opinion

In *Muckleshoot*, the Ninth Circuit upheld this court's determination that the Swinomish do not have fishing rights in Area 10 of Puget Sound by virtue of a reference to "Whidbey Island" in FOF 5. The Ninth Circuit, however, reversed this court's determination of the meaning of the phrase "present environs of Seattle" with respect to the Lummi's U&A. The Ninth Circuit held that this court erred in considering Dr. Lane's understanding of the phrase, which she articulated in a 1995 deposition, to determine Judge Boldt's intent. And it held that the court erred in relying on paragraph 25.*f* as authority to clarify the meaning of terms used in the decree or to resolve an ambiguity with supplemental findings. The

Ninth Circuit held that paragraph 25.*a* was the source of the court's authority to consider such matters. Finally, the Ninth Circuit held that the court should have given the Lummi an opportunity to present additional evidence on the meaning of "environs of Seattle." The Ninth Circuit remanded for further proceedings consistent with its opinion under subparagraph 25.a.

The Ninth Circuit's opinion in *Muckleshoot* is relevant to three issues in this case. One, whether the term FOF 76 is ambiguous. Two, the court's jurisdiction over the three Tribes' claims. And three, whether the court can consider evidence outside the record before Judge Boldt in resolving any ambiguities in FOF 76.

B. Motion to Dismiss/Summary Judgment

The three Tribes seek a declaratory ruling that the Muckleshoot do not have fishing rights in Areas 10, 11 and points beyond. Both sides agree that the Muckleshoot have fishing rights in 10A, which is Elliott Bay. With respect to areas 9, 10 and 11, the Muckleshoot argue that the three Tribes' claim should be dismissed for lack of ambiguity. With respect to the areas beyond Areas 9, 10, and 11, the Muckleshoot argue that the claim should be dismissed because the court does not have continuing jurisdiction over it.

1. Ambiguity

As a threshold issue, the court must decide if the term "Puget Sound" is ambiguous. Whether an ambiguity exists is a question of law. *State Farm Mut. Auto. Inc. Co. v. Fernandez*, 767 F.2d 1299, 1301 (9th Cir. 1985). A judgment is ambiguous if it is "susceptible to more than one interpretation." *Narramore v. United States*, 852 F.2d 485, 490 (9th Cir. 1988). Where a judgment is susceptible to two interpretations, the court should adopt an interpretation that renders the judgment "more reasonable, effective and conclusive in light of the facts and the law of the case." *Pen-*

Ken Gas & Io Corp. v. Warfield Natural Gas Co., 137 F.2d 871, 885 (6th Cir. 1943). If a judgment is unambiguous, the court may not consider extraneous evidence to explain it. *Narramore*, 852 F.2d at 490. If a "a judgment is ambiguous or fails to express the rulings with clarity, the entire record before the issuing court and the findings of fact may be referenced in determining what was decided." *Muckleshoot*, 141 F.3d at 1359. The court must construe the judgment "to give effect to the intention of the issuing court." *Narramore*, 852 F.2d at 490.

Ambiguity may be intrinsic or extrinsic. Intrinsic ambiguity is present when a judgment is unclear on its face. *U.S. v. National Steel Corp.*, 75 F.3d 1146, 1149 (7th Cir. 1996). An extrinsic (or latent) ambiguity exists when the ambiguity is not apparent on the face of the instrument, but it becomes apparent when the instrument is applied to the facts as they exist. *Matter of Estate of Bergau*, 103 Wn.2d 431, 436 (1985).

The three Tribes contend that the term "Puget Sound" is ambiguous in light of the record. And they argue that Judge Boldt's reference to a primary and secondary dichotomy (in the phrase "secondarily in the saltwater of Puget Sound") renders FOF 76 inherently ambiguous. They contend that the Muckleshoot's predecessors were upriver Indians with fisheries primarily in the freshwater of the Duwamish drainage who descended to fish at the river's mouth in Elliott Bay. The record, they argue, contains no evidence that they fished in the open marine waters beyond Elliott Bay. They argue that there is no factual dispute regarding the record that was before Judge Boldt when he entered FOF 76 and summary judgment, therefore, is appropriate. The Muckleshoot argue that there is no textual ambiguity in FOF 76 and the court, therefore, has no authority to issue a new finding interpreting Judge Boldt's original finding.

FOF 76 is ambiguous because it is susceptible to more than one interpretation. The Muckleshoot argue that "Puget

Sound" encompasses the entire inside marine waters from the Canadian border to Olympia. The three Tribes argue that "Puget Sound" is not a phrase that is used consistently and there is no set description of which waters are included in Puget Sound. Furthermore, Judge Boldt's use of the term "secondarily" to describe the Muckleshoot's U&A in Puget Sound is ambiguous. As the three Tribes argue, Judge Boldt may have used the term "secondarily" to indicate that the Muckleshoot made more restricted use of saltwater fisheries than their river fisheries listed in FOF 76. And, if so, it is not clear if the restriction is one of frequency, species, amount or geography.

2. Evidence admissible to resolve an ambiguity

Because the phrases "Puget Sound" and "secondarily" are ambiguous, the next issue is what evidence the court can consider to resolve the ambiguity. The three Tribes contend that the Ninth Circuit's *Muckleshoot* opinion forecloses consideration of evidence that was not in the record before Judge Boldt. They argue that the opinion allows extra record evidence *only* if the record does not contain any evidence clarifying the issue before the court and the ambiguity, therefore, cannot be resolved from the record. The three Tribes argue that the ambiguity in this case can be resolved by reference to the record alone. The Muckleshoot maintain that there is no ambiguity. But, if the court finds otherwise, they argue that the Ninth Circuit's *Muckleshoot* opinion only bars imputation of Dr. Lane's personal understanding of the record to Judge Boldt; it does not otherwise bar this court's consideration of other evidence.

The Ninth Circuit held that this court "correctly determined that 'the key to resolving the controversy lies in determining what Judge Boldt meant in precise geographic terms by his use of the phrase "the present environs of Seattle."'" 141 F.3d at 1358. It held, however, that this court erred in concluding that Judge Boldt's intended meaning could be determined by

reference to what Dr. Lane later testified *she* intended the phrase to mean in her reports to Judge Boldt. The Ninth Circuit held that Dr. Lane's latter-day testimony is extraneous to the decree and the underlying record and that its admission was in error. It observed, however, that on remand "[i]t will be up to the parties to offer admissible evidence to enable the district court to interpret the decree in specific geographic terms. While evidence that was before Judge Boldt when he made his finding is obviously relevant, there may be *other evidence* indicative of the contemporary understanding of 'the present environs of Seattle.'" 141 F.3d at 1359 (emphasis added). Since the Ninth Circuit explicitly stated that this court can consider evidence besides evidence before Judge Boldt when he made his finding, it is not foreclosed from considering extra record evidence. It is, however, foreclosed from imputing someone else's understanding of a phrase to Judge Boldt.

The court rejects the three Tribes' argument that it can only consider extra-record evidence if it cannot resolve the ambiguity from the record before Judge Boldt. Nothing in the Ninth Circuit's *Muckleshoot* opinion compels this type of restriction. While the evidence before Judge Boldt is unquestionably the most relevant and persuasive in determining his intention, the court does not need to make a separate inquiry to determine if it can go outside the record in the first place.

3. Continuing jurisdiction (Areas beyond 9, 10, 11)

In *Muckleshoot* the Lummi were currently taking fish in the disputed area. The Ninth Circuit remanded with instructions to proceed under subparagraph *a* because the court was presented with a controversy over whether a party's actions were in conformity with the injunction; namely, whether the southern portion of the areas in which the Lummi were currently taking fish was in conformity with the decree. Here, the Muckleshoot have no present intention of fishing in areas

beyond Areas 9, 10, and 11. And they argue that the court does not have jurisdiction over the three Tribes' motion for summary judgment with respect to those areas under either subparagraph a or f.

The *Muckleshoot* argue that the court cannot make a supplemental finding under subparagraph *f* under *Muckleshoot* to determine their fishing rights in areas beyond Areas 9, 10, and 11. The court agrees that *Muckleshoot* forecloses this approach. In *Muckleshoot*, as an alternative holding, this court made a supplemental finding of fact under paragraph 25.f, which reserved continuing jurisdiction to determine "the location of a tribe's usual and accustomed fishing grounds not specifically determined" by Judge Boldt. The Ninth Circuit ruled that this alternative holding could not be upheld. It held that this court did not have jurisdiction under subparagraph *f* to make a supplemental finding to determine the location of Lummi's U&A because Judge Boldt had already made that determination, albeit using an ambiguous description. And it remanded with specific instructions to proceed under subparagraph 25.*a*, which reserves continuing jurisdiction to determine "whether or not the actions . . . by any party . . . are in conformity with" the injunction in *United States v. Washington*.

Here, as in *Muckleshoot*, Judge Boldt has already made a finding of fact determining the location of Muckleshoot's U&A. Although his description may have turned out to be ambiguous, he did make a specific determination. Subparagraph f "does not authorize the court to clarify the meaning of terms used in the decree or resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree." *Muckleshoot*, 141 F.3d at 1359. Issuing a supplemental finding under subparagraph f defining the scope of Muckleshoot's U&A in Puget Sound would "alter, amend or enlarge upon" Judge Boldt's

description, contrary to the Ninth Circuit's holding in *Muckleshoot*.

The Muckleshoot also argue that this court cannot make a decision under subparagraph *a* about whether their actions in areas beyond Areas 9, 10, and 11, are "in conformity with" the injunction because they are not currently fishing in those areas nor do have they have a present stated intention to do so. Since they do not intend to fish in those areas, the petitioners' claim does not require a determination as to whether "actions, intended or effected by any party" are in conformity with the permanent injunction with respect to those areas. The Muckleshoot argue, therefore, that the court does not have jurisdiction to adjudicate their fishing rights in those areas.

The court notes that the Muckleshoot's argument is at odds with their argument that Judge Boldt's use of the term "Puget Sound" means the inside marine waters from the Canadian border to Olympia, an area that encompasses marine waters beyond Areas 9, 10, and 11; they are claiming a U&A that extends beyond Areas 9, 10, and 11, yet they contend the court cannot resolve this issue because they have no stated intention to fish those areas at this time. Nonetheless, the court agrees with the Muckleshoot that pursuant to the Ninth Circuit's opinion in *Muckleshoot*, it does not have jurisdiction under subparagraph a to resolve the petitioners' claims with respect to areas outside Areas 9, 10, and 11 at this time because the Muckleshoot have not manifested an intent to fish in those areas. The court, therefore, grants the Muckleshoot's motion to dismiss with respect to areas outside Areas 9, 10, and 11, and reserves the question of whether those areas are part of the Muckleshoot's U&A.

4. Need for an evidentiary hearing

The Three Tribes argue that there is no need for an evidentiary hearing and that the court can and should make its determination solely from the record evidence. As discussed

above, however, the Ninth Circuit's reference to "other evidence" outside what was before Judge Boldt clearly allows the court to hold an evidentiary hearing and consider new evidence of his intent. The court, therefore, will hold an evidentiary hearing for the purpose of determining whether Judge Boldt intended to include Areas 9, 10 and 11, in his definition of Puget Sound. At the hearing, the court will consider relevant extra record evidence in support of the parties' positions. Although the court will hear argument on and consider evidence already in the record, the purpose of the upcoming evidentiary hearing will be limited to admitting evidence not already in the record. The parties should be prepared to argue and address whether Judge Boldt intended to restrict Muckleshoot's U&A in the Puget Sound by finding that they had usual and accustomed fishing areas primarily upriver and only "secondarily in the saltwaters of Puget Sound." And, if he did intend to so restrict their fishing rights, how (i.e. geographically, temporally or otherwise).

C. Motion to Strike

The three Tribes move to strike portions of the Muckleshoot's brief, appendix and affidavit of Barbara Lane. The court hereby grants that motion in part. The court will consider extra record evidence as long as it is relevant to determining Judge Boldt's intention.

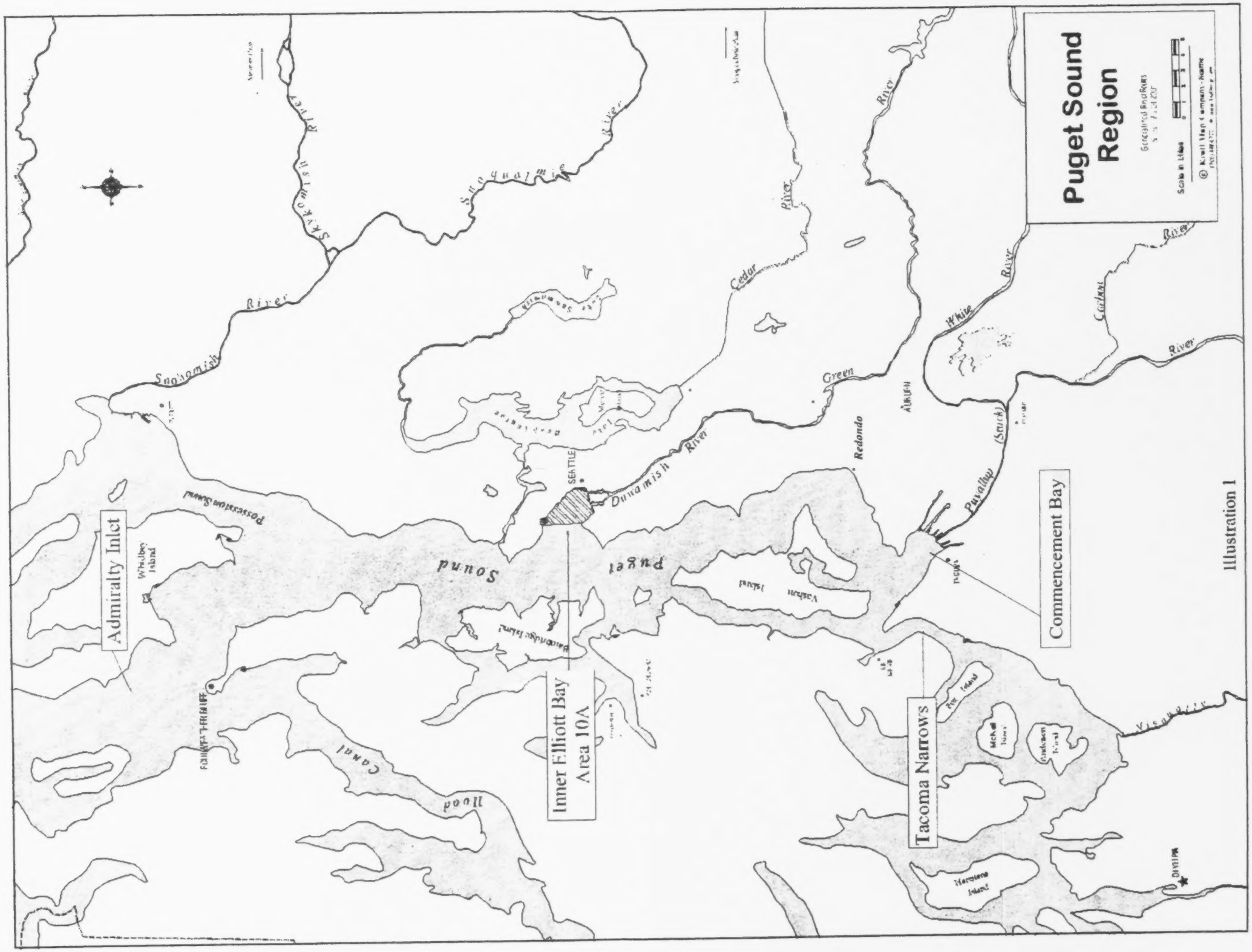
III. CONCLUSION

The court GRANTS respondent's motion to dismiss [docket 46-1], GRANTS the petitioners' motion to strike [docket 66-1], and DENIES petitioners' motion for summary judgment [docket 49-1). The court hereby schedules a pretrial conference for Tuesday September 1 at 1 p.m. At the pretrial conference, the court will set a date for the evidentiary hearing. The parties shall submit to the court no later than August 28 a joint pretrial order setting forth any discovery requests or issues that need to be resolved by the court, the expected

length of the evidentiary hearing, and a list of proposed witness and exhibits.

DATED at Seattle, Washington this 5th day of August, 1998.

/s/_____
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE



BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
AUG 30 2001
OFFICE OF THE CLERK

No. 01-14

IN THE

Supreme Court of the United States

MUCKLESHOOT INDIAN TRIBE,
Petitioner,

v.

PUYALLUP INDIAN TRIBE, *et al*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF THE PUYALLUP TRIBE, THE SUQUAMISH TRIBE, THE SWINOMISH INDIAN TRIBAL COMMUNITY, AND THE TULALIP TRIBES

ANNETTE M. KLAPSTEIN
PUYALLUP INDIAN TRIBE
2002 East 28th Street
Tacoma, Washington 98404
(253) 573-7877

HARRY R. SACHSE *
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240

* Counsel of Record

Attorneys for the Puyallup Indian Tribe

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

MICHELLE HANSEN
SCOTT WHEAT
P.O. Box 498
Suquamish, WA 98392
(360) 598-6295

Attorneys for the Suquamish Indian Tribe

ALIX FOSTER
P.O. Box 817
LaConner, WA 98501
(360) 466-3163

Attorney for Swinomish Indian Tribal Community

MASON D. MORISSET
801 Second Avenue
Suite 1115
Seattle, WA 98104-1509
(206) 386-5200

Attorney for Tulalip Tribes

QUESTION PRESENTED

Whether the district court under its retained jurisdiction correctly interpreted its earlier finding of fact establishing the usual and accustomed fishing places of the Muckleshoot Tribe.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Background Facts	1
B. Question Presented For Review	5
REASONS FOR DENYING THE PETITION	6
I. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS, NOR HAS IT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION OF A STATE COURT OF LAST RESORT	6
II. THE DECISION BELOW DOES NOT WARRANT THE SUPERVISORY JURISDICTION OF THIS COURT	6
A. The Phrase "and Secondarily in the Saltwater Of Puget Sound" Required Interpretation To Determine Where Muckleshoot Could Lawfully Fish	6
B. Res Judicata Does Not Bar Resolution Of Ambiguities Within A Judgment	9
III. THE COURT SHOULD NOT GRANT REVIEW FOR THE ADDITIONAL REASON THAT THE PETITIONER IS JUDICIALLY ESTOPPED FROM MAKING ITS PRINCIPAL ARGUMENT	9
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Brown v. Felsen, 442 U.S. 127 (1979) 9
Julian Petroleum Corp. v. Courtney Petroleum Co., 22 F.2d 360 (9th Cir. 1927) 7
Marshall v. Andrew F. Mahony Co., 56 F.2d 74 (9th Cir. 1932) 7
Montana v. United States, 440 U.S. 544 (1981) ... 9
Muckleshoot Tribe v. Lummi Indian Nation, 234 F.3d 1099 (9th Cir. 2000) 2
Muckleshoot Tribe v. Lummi Indian Tribe, 141 F.3d 1355 (9th Cir. 1998) ..... *passim*
New Hampshire v. Maine, ___ U.S. ___, 121 S. Ct. 1808 (2001) 10, 11
O'Brien v. Miller, 168 U.S. 287 (1897) 8
United States v. Lummi Indian Tribe, 235 F.3d 443 (9th Cir. 2000) 2
United States v. Muckleshoot Indian Tribe, 235 F.3d 429 (9th Cir. 2000) 2
United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) ..... *passim*
United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1975) 2
United States v. Washington, 626 F. Supp. 1405 (W.D. Wash. 1981) 2
Washington v. Courville, 676 P.2d 1011 (Wash. Ct. App. 1983) 3

RULES

United States Supreme Court Rule 10 6

STATEMENT OF THE CASE

The decision for which review is sought affirmed a district court decision resolving a dispute between several tribes over the fishing boundaries set in an earlier finding of fact by the same court. The district court specifically retained jurisdiction to resolve such disputes, and has done so many times. Indeed the petitioner, the Muckleshoot Tribe, itself previously brought just such an action and obtained just such a resolution of another Tribe's fishing grounds. *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998). The procedure undertaken by the district court to resolve these disputes is ordinary and essential. There is no conflict with any other circuit, or with any state Supreme Court decision. Nor has the Muckleshoot Tribe presented an important question of federal law that has been decided either contrary to the decisions of this Court or in the absence of a decision by this Court. Nothing in the case warrants review by this Court.

A. Background Facts

In 1974, Judge Boldt of the United States District Court for the Western District of Washington entered a judgment adjudicating the treaty-reserved fishing rights of many Indian tribes in Washington State and determining, often in general terms, the waters within which those rights may be exercised. *United States v. Washington*, 384 F. Supp. 312, 359-82 (W.D. Wash. 1974) (hereinafter "Final Decision No. 1" or "Boldt decision"). The primary emphasis at the time of the judgment was on basic treaty-interpretation—whether the tribes were entitled to any allocation of fish, what that allocation should be, and what, if any, authority the State might exercise over tribal fishing. Although the Court made a conscientious effort to delineate "usual and accustomed" fishing areas (hereinafter "U&A") within which each tribe was entitled to exercise treaty rights, many of these findings lacked geographical precision. The court, foreseeing the need for

future determinations, explicitly provided that any party could invoke the continuing jurisdiction of the court in order to determine "whether or not the actions, intended or effected by any party . . . are in conformity with Final Decision No. 1." *Id.* at 419.

Subsequently, there have been numerous sub-proceedings clarifying ambiguities in descriptions of usual and accustomed fishing places.[1] At least four times, the Ninth Circuit has reviewed such determinations.[2] The petitioner, Muckleshoot Tribe, has been a prominent user of this technique to have more specific lines drawn around the fishing areas of other tribes. *See* footnote 2. This case does just that. It more specifically defines Muckleshoot's customary marine fishing areas.

Finding of Fact 76 of Judge Boldt's original decision states that the treaty-time predecessors of the Muckleshoot Indian Tribe fished:

---

[1] *See, e.g.*, "Orders re Herring Fisheries and Determination of Usual and Accustomed Fishing Places of Additional Tribes," 459 F. Supp. 1020, 1048 (W.D. Wash. 1975); "Order re Makah Tribe's Request for Reconsideration of the Lower Elwha Usual and Accustomed Fishing Places," *United States v. Washington*, 459 F. Supp. 1020, 1056; "Findings of Fact and Conclusions of Law re Determination of Additional Usual and Accustomed Fishing Places of Nisqually, Puyallup and Squaxin Island Indian Tribes," *United States v. Washington*, 626 F. Supp. 1405, 1441 (W.D. Wash. 1981); "Order re Makah Tribe's Ocean Fishing Grounds," *United States v. Washington*, 626 F. Supp. 1405, 1466 (W.D. Wash. 1982); "Order Adopting . . . Report . . . re Skokomish Indian Tribe's Request for Determination of Primary Rights at Hood Canal Fishery," *United States v. Washington*, 626 F. Supp. 1405, 1486 (W.D. Wash. 1984).

[2] *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) (*Lummi and Swinomish U&A*); *Muckleshoot Tribe v. Lummi Indian Nation*, 234 F.3d 1099 (9th Cir. 2000) (*Lummi U&A*); *United States v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000) (*Lummi U&A*); and the instant case, *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000).

> primarily at locations on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek, and Newaukum Creek) and Lake Washington, and *secondarily in the saltwater of Puget Sound.*

384 F. Supp. at 367 (emphasis added).

This did not mean that the Muckleshoot could fish in *all* of Puget Sound. Major portions of Puget Sound were found in the same set of findings to be the usual and accustomed fishing places of other tribes. *See, e.g.*, 384 F. Supp. at 371 (Finding of Fact 99, Puyallup Tribe); at 360 (Finding of Fact 46, Lummi Tribe). After the *Boldt* decision, in the 1970s, Muckleshoot opened commercial fisheries within the rivers listed in the finding, in Lake Washington, and also in the salt water of Elliott Bay, the portion of Puget Sound nearest its reservation known as Area 10A, and in Area 10, a fisheries management area west of Elliott Bay.[3] Muckleshoot did *not* open fisheries in Areas 9 or 11, which are marine fisheries management areas to the north and south of Elliott Bay, reserved to other tribes.[4]

More than 20 years later, the Muckleshoot Tribe announced it would begin fishing in Area 11, an area previously exclusively fished by the Puyallup Tribe. In response to this announcement, the Puyallup Tribe initiated

---

[3] For fisheries management purposes, the State of Washington delineated its waters into numerically identifiable areas. For ease of identification in this matter, with the approval of the District Court, the parties adopted the State's designation of fisheries management areas for geographical reference purposes.

[4] Petitioner claims to have "regularly fished in areas of Puget Sound to its north, west and south." Pet. at 6 (citing *Washington v. Courville*, 676 P.2d 1011 (Wash. Ct. App. 1983)). *Courville* was a state criminal prosecution of three *individual* Muckleshoot Tribal members for gathering shellfish at Redondo Beach in which no tribe participated. The Muckleshoot Tribe did not participate in that activity.

this sub-proceeding under the court's continuing jurisdiction, requesting a determination that Muckleshoot's usual and accustomed areas as set forth in Finding of Fact 76, do not include any marine area outside Elliott Bay. The Puyallup Tribe was subsequently joined by the Suquamish and Swinomish Tribes as plaintiffs, after Muckleshoot representatives expressed an interest in expanding its fisheries north and west of Elliott Bay into Areas 10E and 9.

On cross-motions for summary judgment, after reviewing the portions of the original record submitted by the parties, the district court granted the three plaintiff Tribes' motion. The court found the phrase "secondarily in the salt waters of Puget Sound" ambiguous. Pet. App. 22a. It also found that the evidence in the record overwhelmingly supported an interpretation of Finding of Fact 76 limiting Muckleshoot's marine fisheries to Elliott Bay. Pet. App. 20a-33a. The record showed the Muckleshoot were primarily fresh water fishers, who only rarely fished in that portion of Puget Sound at the mouth of the Duwamish River (namely, Elliott Bay),[5] and then only in connection with shoreline shellfish activities. The district court enjoined Muckleshoot from fishing in Areas 9, 10 and 11. *Id.* at 32a. Specifically, the district court found:

> In light of the other U&As Judge Boldt delineated, it is inconceivable to the court that he would intend to give the Muckleshoot, an upriver people, a vast saltwater U&A stretching from the Tacoma Narrows to Admiralty Inlet and overlapping the U&As of tribes with a documented history of open water fishing in the same areas. The evidence in the record is that the Muckleshoot's predecessors were upriver Indians with

[5] The treaty-time villages of the upriver Muckleshoot Indians were located predominantly in the upper reaches of the Duwamish River drainage. ER 31,47-48, 54, 73. The Duwamish Tribe was situated in the lower reaches of that drainage and on the surrounding salt water bays. ER 47.

> fisheries primarily in the freshwater of the Duwamish drainage who descended to fish at the river's mouth in Elliott Bay. There is no evidence that the Muckleshoot fished in the open marine waters beyond Elliott Bay. Furthermore, there is no evidence that the Muckleshoot possessed the technology to fish on the open waters of Puget Sound.

Id. at 30a.

Muckleshoot appealed this ruling to the Ninth Circuit, which affirmed. Pet. App. 3a-18a. The Court of Appeals held that Finding of Fact 76 must be read in the context of the entire opinion, *id.* at 8a, and in that context it is plainly evident that Muckleshoot was primarily a river fishing tribe, with limited fishing in salt water. The Court concluded that nothing in that opinion (including the evidence in support thereof) supported any usual and accustomed fishing area of the Muckleshoot Tribe beyond the salt water of Elliott Bay. *Id.* at 10a. The Court of Appeals agreed with the district court that

> [T]here is no evidence in the record before Judge Boldt, nor is [the court] persuaded by extra-record evidence, that Judge Boldt intended to describe a saltwater U&A any larger than the open water and shores of Elliott Bay.

Pet. App. 9a.

B. Question Presented For Review

The alleged issue of "*res judicata*" based on the allocation of a "radically narrowed" fishing area "on which the Tribe has relied for twenty-seven years," Pet. at 26, is not supported by the record. The question presented, more properly stated, is:

> Whether the district court under its retained jurisdiction, correctly interpreted its earlier finding of fact establishing the usual and accustomed fishing places of the Muckleshoot Tribe.

This is not an issue that requires review by this Court.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS, NOR HAS IT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION OF A STATE COURT OF LAST RESORT.

Petitioner does not allege that the decision below conflicts with the decision of any federal court of appeals or state court of last resort, and we know of no such conflict. Nothing could be more local than a district court giving more specific definition to a geographic location described only in its own prior decision, under specifically retained jurisdiction. The Courts below were not directly interpreting a treaty or the Constitution of the United States or an Act of Congress, but only a prior decision by the same district court. There is no reason for this Court to review this case.

II. THE DECISION BELOW DOES NOT WARRANT THE SUPERVISORY JURISDICTION OF THIS COURT.

The Court has stated that it will grant a writ of *certiorari* "only for compelling reasons" such as to review a decision that has "so far departed from accepted and usual course of judicial proceeding . . . as to call for the exercise of this Court's supervisory power." Sup. Ct. R. 10. There is no such departure here.

A. The Phrase "and Secondarily in the Saltwater Of Puget Sound" Required Interpretation To Determine Where Muckleshoot Could Lawfully Fish.

Finding of Fact 76 defines Muckleshoot's usual and accustomed fishing areas as various rivers and a lake and "*secondarily in the saltwater of Puget Sound.*" *United States*

v. Washington, 384 F. Supp. at 367 (emphasis added). Judge Boldt did not say "throughout Puget Sound" and would not have said so, because he typically found the usual and accustomed fishing places of other upriver tribes confined to rivers along which their traditional villages were located. *See, e.g.*, at 376 (Finding of Fact 131); at 379 (Finding of Fact 148).[6] But neither did he say exactly where in Puget Sound Muckleshoot could fish. It is not surprising that this phrase later caused some dispute.

The Court of Appeals has now stated in two sub-proceedings, one brought by the Muckleshoot Tribe itself, that the proper inquiry is not the meaning of individual words, in isolation, but, "what Judge Boldt meant in precise geographic terms by his use of [a particular] phrase." *Muckleshoot Tribe v. Lummi Tribe*, 141 F.3d 1355, 1359 (9th Cir. 1998); *see*, Pet. App. 8a. The Courts below resolved the parties' conflict using the longstanding and uncontroversial rule that the "language of the Court must be read in light of the facts before it." Pet. App. 8a (citing *Julian Petroleum Corp. v. Courtney Petroleum Co.*, 22 F.2d 360, 362 (9th Cir. 1927)); *see also*, *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). This is particularly appropriate, where, as here, the findings themselves refer to documents in the record of the court.

---

[6] Where Judge Boldt did refer to salt water fishing by these upriver tribes, it was in the context of upriver tribes descending their "home" rivers to their mouths to harvest resources "unavailable in their own territory." *United States v. Washington*, 384 F. Supp. at 376 (Finding of Fact 132); at 368 (Finding of Fact 85). No upriver tribe had usual and accustomed fishing areas in the salt water co-extensive with the widely traveled salt water tribes. Should Muckleshoot succeed in expanding its fishing areas into Areas 9, 10 and 11, its U&A would be more extensive than many salt water tribes. *See, e.g., id.* at 371 (Finding of Fact 96); at 378 (Finding of Fact 141).

Over 100 years ago, in a contract interpretation case, this Court rejected a request to focus on the use of particular words in isolation and required that courts look to the full context in which the words were used. The Court noted the problem that would result if the search were limited to words in isolation: "in order to establish want of ambiguity . . . a few words can be segregated from the entire context, and that, because the words thus set apart are not intrinsically ambiguous, there is no room for construing" the entire document. *O'Brien v. Miller*, 168 U.S. 287, 297 (1897). Similarly, findings of fact must be read as a whole and in context. Pet. App. 8a.

Here, Finding of Fact 76 specifically referred to certain exhibits. The district court and the Ninth Circuit carefully reviewed the record which was before Judge Boldt and gave particular attention to the evidence which was cited in Finding of Fact 76 itself. The Muckleshoot's claim that the Ninth Circuit "proceeded to . . . reject . . . the items cited in Finding of Fact 76," pet. at 8, is incorrect. What the Ninth Circuit rejected was the strained interpretation of this evidence advocated by Muckleshoot—trying to assert a right to fish anywhere in Puget Sound when that was clearly not intended. At the very outset of its analysis of the record, the Court of Appeals stated: "[a]s the district court recognized, the most relevant evidence in determining what Judge Boldt intended by the phrase 'secondarily in the saltwater of Puget Sound' consists of the four documents referenced in Finding of Fact 76." Pet. App. at 9a. Both the district court and the Ninth Circuit gave great weight to those documents. Both courts found the evidentiary record firmly establishes that the treaty-time ancestors of the Muckleshoot Tribe were upriver people, and among those least likely to have engaged in regular fishing throughout all the waters of Puget Sound. Judge Boldt's understanding that Muckleshoot descended to the mouth of the Duwamish river to fish near their regular river fishing grounds did not mean they could fish anywhere

they wanted in Puget Sound and usurp the fishing areas of other Tribes with fisheries in those areas. And, reviewing the record, both courts so found.

B. *Res Judicata* Does Not Bar Resolution Of Ambiguities Within A Judgment

Petitioner relies greatly on arguments concerning *res judicata*. Pet. at 15-29. The purpose underlying the doctrine of *res judicata* is to avoid the social burdens of repetitive litigation and the risk of inconsistent decisions. *Montana v. United States*, 440 U.S. 544, 553-54 (1981). *Res judicata* is an affirmative defense which must be treated with caution because, while it serves important values of repose, it also potentially "blockades unexplored paths that may lead to truth . . . [and] shields the fraud and the cheat as well as the honest person." *Brown v. Felsen*, 442 U.S. 127, 132 (1979). Where, as here, a district court has deliberately retained jurisdiction to determine whether its ruling is being followed correctly, there is no reason to evoke *res judicata*. No court has held that judicial economy is served by shielding a vague portion of a ruling from subsequent interpretation under retained jurisdiction.

III. THE COURT SHOULD NOT GRANT REVIEW FOR THE ADDITIONAL REASON THAT THE PETITIONER IS JUDICIALLY ESTOPPED FROM MAKING ITS PRINCIPAL ARGUMENT.

In a suit to limit the interpretation of the usual and accustomed fishing places of the Lummi Tribe, the Muckleshoot Tribe successfully argued that *res judicata* is inapplicable. *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d at 1359, n.6. In that case, Muckleshoot sought to have the Court of Appeals clarify two U&A findings: Finding of Fact 6 (which marine waters did Judge Boldt intend to include by the phrase "from the Fraser River south to and including Whidbey?"); and Finding of Fact 46 (which marine

waters did he intend to include by the phrase from the Fraser River south to the "present environs of Seattle?"). Lummi argued *res judicata*. The appellate Court held:

> Lummi's assertion that Muckleshoot's partial summary judgment motion is barred by res judicata or the law of the case doctrine is inapposite. Muckleshoot's motion did not propose to relitigate issues finally determined by the decrees but sought only clarification of two findings in *Decision I* and *Decision II*.

Id.

It is particularly disingenuous for the Muckleshoot Tribe to petition this Court to reverse the Ninth Circuit for applying the very rule Muckleshoot successfully established in prior litigation in this same case. More importantly, the doctrine of judicial estoppel bars Muckleshoot from pursuing the opposite side of its *res judicata* argument in this petition. Since the entire petition is based upon an alleged violation of the doctrine of *res judicata*, the entire petition must fail and should therefore be denied.

This Court discussed and applied the doctrine of judicial estoppel last term in *New Hampshire v. Maine*, ___ U.S. ___, 121 S. Ct. 1808 (2001). In that case, the Court held that New Hampshire was equitably barred from asserting a position regarding the boundary between New Hampshire and Maine that was inconsistent with a position it had taken with respect to the boundary in earlier litigation.

In invoking the doctrine of judicial estoppel, this Court observed that:

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Id. at 1814.

Although the Court explicitly stated that it was not "establish[ing] inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel," *id.* at 1815, the Court listed three factors that should be considered in deciding whether to apply the doctrine: (i) whether "a party's later position must be 'clearly inconsistent' with its earlier position;" (ii) "whether the party has succeeded in persuading a court to accept that party's earlier position;" and (iii) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (citations omitted). Applying these factors, the Court found that "[h]aving convinced this Court to accept one interpretation of 'Middle of the River,' and having benefitted from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense." *Id.* at 1817. As a result, the Court barred New Hampshire from making that assertion.

The same is true here. Muckleshoot, to diminish Lummi's fishing grounds, successfully argued to the Ninth Circuit that *res judicata* does not bar subsequent proceedings that seek to clarify the geographic scope of Judge Boldt's U&A findings. Muckleshoot, as a defendant and petitioner, now takes a position directly contrary to its previous position. If Muckleshoot were successful, it would gain an unfair advantage by expanding its fishing territory at the expense of other tribes once by arguing *res judicata* is not applicable and now by arguing it is. The doctrine of judicial estoppel bars this type of inequitable outcome.

CONCLUSION

The Petition for a writ of *certiorari* should be denied.

Respectfully submitted,

ANNETTE M. KLAPSTEIN
PUYALLUP INDIAN TRIBE
2002 East 28th Street
Tacoma, Washington 98404
(253) 573-7877

HARRY R. SACHSE *
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240

* Counsel of Record

Attorneys for the Puyallup Indian Tribe

August , 2001

MICHELLE HANSEN
SCOTT WHEAT
P.O. Box 498
Suquamish, WA 98392
(360) 598-6295

Attorneys for the Suquamish Indian Tribe

ALIX FOSTER
P.O. Box 817
LaConner, WA 98501
(360) 466-3163

Attorney for Swinomish Indian Tribal Community

MASON D. MORISSET
801 Second Avenue
Suite 1115
Seattle, WA 98104-1509
(206) 386-5200

Attorney for Tulalip Tribes

Supreme Court, U.S.
FILED
SEP 12 2001
CLERK

No. 01-14

IN THE
Supreme Court of the United States

MUCKLESHOOT INDIAN TRIBE,
Petitioner,

v.

PUYALLUP INDIAN TRIBE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY FOR THE PETITIONER

ROBERT L. OTSEA, JR.
Muckleshoot Indian Tribe
39015-172nd Avenue, S.E.
Auburn, WA 98092

GREGORY M. O'LEARY
821 Second Avenue
Suite 2000
Seattle, WA 98104

DONALD B. AYER
(Counsel of Record)
MICHAEL S. FRIED
CYNTHIA L. BAUERLY
Jones, Day, Reavis & Pogue
51 Louisiana Ave., N.W.
Washington, D.C. 20001

Counsel for Petitioner

---

19 pt f/o

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 7

MAP 8

TABLE OF AUTHORITIES

Page

CASES

Nevada v. United States, 463 U.S. 110 (1983) 4

New Hampshire v. Maine, 121 S. Ct. 1808 (2001) 6

O'Brien v. Miller, 168 U.S. 287 (1897) 2

Washington v. Courville, 676 P.2d 1011 (Wash. Ct. App. 1983) 5

REPLY FOR THE PETITIONER

1. In its petition, the Muckleshoot Indian Tribe demonstrated (1) that the plain meaning of the phrase "Puget Sound" in Finding 76 unambiguously includes a far broader area than Elliott Bay, to which the Ninth Circuit "interpreted" it to be limited (Pet. 17); (2) that the structure, purpose, and full context of Judge Boldt's order as a whole confirms that he meant by this language precisely what he said (Pet. 2-3, 18); (3) that Finding 76 was contested at trial and adjudicated by Judge Boldt in an unreservedly final ruling (Pet. 19-20); (4) that this sub-proceeding involves parties that all participated in, or expressly agreed to be bound by, the earlier phase of the case (Pet. 20-21); (5) that the district court's limited retention of jurisdiction over the case for unrelated purposes has no effect on the *res judicata* analysis (Pet. 21-26); and (6) that the Ninth Circuit's rewriting of Finding 76 implicates a variety of factors that heighten the importance of the finality of judgments and the necessity for review by this Court, such as its adjudication of treaty rights, its apportionment of group rights to natural resources, and its securing of treaty rights to an Indian tribe, with whom the United States has an important relationship. Respondents offer no significant response to any of these points or to the Muckleshoot Tribe's basic argument that the Ninth Circuit flagrantly violated *res judicata* in an area where it is most critical.

2. The Muckleshoot Tribe showed that the Ninth Circuit's construction of "the saltwater of Puget Sound" to include only Elliott Bay was an alteration rather than an application of the unambiguous meaning of Finding 76 (Pet. 15-18). Arguing to the contrary, respondents cite a

nineteenth century contract case for the uneventful proposition that language must be read in its context (Opp. 8 (citing *O'Brien v. Miller*, 168 U.S. 287 (1897)). But respondents ignore the Muckleshoot Tribe's extensive discussion of the context of the phrase "Puget Sound" in Finding 76 showing that, for a variety of different reasons, the phrase clearly was not meant in some novel sense to mean Elliott Bay (Pet. 2-5, 18). Respondents offer no discussion of their own in this regard, and do not offer any textual argument that "Puget Sound" can be reasonably construed to refer only to Elliott Bay.

Instead, respondents go on to acknowledge frankly that the Ninth Circuit based its decision on an independent review of the record evidence underlying Finding 76 (Opp. 8). Respondents assert that the Ninth Circuit "found the evidentiary record firmly establishes that the treaty-time ancestors of the Muckleshoot Tribe were upriver people, and among those least likely to have engaged in regular fishing throughout all the waters of Puget Sound" (Opp. 8).[1] Thus, respondents affirmatively embrace the Muckleshoot Tribe's showing (Pet. 15-17) that the Ninth Circuit's "interpretation" of Finding 76 consisted simply of ascribing to Judge Boldt whatever "meaning" was necessary to make it comport with the Ninth Circuit's own factfinding.[2]

---

[1] Respondents are flatly wrong in saying that Elliott Bay is "the portion of Puget Sound nearest [the Muckleshoot Tribe's] reservation" (Opp. 3). The Muckleshoot reservation is substantially closer to the portion of Puget Sound adjacent to Vashon Island (Area 11) than it is to Elliott Bay. *See infra* at 8 (map).

[2] Even if "reviewing the record" (Op. 9) were a proper means of interpreting a court order, the Ninth Circuit's decision would still be plainly erroneous. Respondents nowhere address the Muckleshoot Tribe's

3. The petition also demonstrated that the Ninth Circuit's readjudication of the Muckleshoot Tribe's U&A fishing area violated the doctrine of *res judicata* (Pet. 19-26). Respondents' discussion of *res judicata* (Opp. 9) consists of a single paragraph that addresses none of the elements of the applicable test under that doctrine. Not only does this scant response fail to confront any of the Muckleshoot Tribe's substantive arguments on this point, but it is premised upon the assumption that the Ninth Circuit's decision resolved an ambiguity in Finding 76 (Opp. 9) — a premise that the Ninth Circuit itself expressly disclaimed (Pet. App. 8a). Respondents' failure to address the central issue in the petition underscores the absence of any conceivable justification for the Ninth Circuit's ruling under this Court's precedents.

The Muckleshoot Tribe showed that there is no exception to the requirements of *res judicata* in this case based upon the district court's retention of jurisdiction over the case (Pet. 21-26). This is reinforced by the actual language of the applicable reservation of jurisdiction in the district court's order, which was limited to ascertaining "whether or not the actions . . . [of] any party . . . are in conformity with Final Decision #I or this injunction." 384 F. Supp. at 419 ¶ 25(a) (*see also* Pet. 21-22). Respondents mention "retained jurisdiction" in passing (Opp. 9), but make no effort to address the arguments and authorities set out in the petition. Thus, the Muckleshoot Tribe's showing on this point, too, stands unanswered.

---

demonstration that the evidence expressly placed that tribe's treaty-time ancestors far outside Elliott Bay in the Sound, or the fact that several of the rivers on which the Muckleshoot Tribe's treaty-time ancestors lived and traveled entered the Sound far south of Elliott Bay, in Areas 11 and 11A (Pet. 10-12 (identifying the rivers on which the Muckleshoot ancestors lived and discussing evidence that they fished in the Sound as far south as Commencement Bay)).

4. The Muckleshoot Tribe showed that *res judicata* is particularly important in the context of this case for numerous reasons, and that review by this Court is therefore especially important (Pet. 26-29; *see, e.g.*, *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983)). Respondents' conclusory assertion that this case is not sufficiently important to warrant this Court's review (Opp. 6) does nothing to answer this showing. Respondents first note that the petition is not premised upon a circuit split, but then immediately proceed to acknowledge that no such split could possibly arise with respect to this issue because the effect of the Ninth Circuit's decision is "local" to Washington Indian Tribes near the Puget Sound.

Respondents next assert that the case does not merit review because the Ninth Circuit was "not directly interpreting a treaty." But the Muckleshoot Tribe's treaty rights are at the center of this case, and this fact is one reason why the Ninth Circuit's error is of sufficient importance to warrant this Court's review. Respondents fail even to mention, let alone respond to, the other factors identified in the petition demonstrating the unique importance of review in this case. The strong interest in finality with regard to decisions allocating the rights of large groups of people to natural resources and the special, long-standing interest in ensuring fairness in protecting the federal rights of Indian tribes demonstrate the need for this Court's review, and stand entirely unaddressed by respondents. Respondents also do not offer any response to the Muckleshoot Tribe's demonstration (Pet. 29) that the Ninth Circuit's decision threatens the finality of judgments generally, and particularly in cases of retained jurisdiction, by sanctioning the reevaluation of evidence even where the order in issue is unambiguous in all relevant respects.

Respondents attempt to minimize the extent of the Muckleshoot Tribe's reliance upon Finding 76 over the decades it remained unamended by stating (Opp. 3) that the Muckleshoot Tribe opened commercial fisheries in Elliott Bay

and in Area 10, but not in Areas 9 or 11. Respondents thus concede that the Ninth Circuit decision, if allowed to stand, will force the Muckleshoot Tribe to abandon the commercial fisheries it has pursued for a quarter century in Area 10, a large region encompassing the central area of the Puget Sound, *see infra* at 8 (map). The Muckleshoot Tribe has heretofore fished extensively throughout this broad area of the Sound.

In any event, the extent of the Muckleshoot Tribe's reliance upon Finding 76 cannot be measured by the locations of its commercial fisheries alone. Muckleshoot tribal members, exercising the tribe's treaty fishing rights under Finding 76, have routinely fished elsewhere in the Sound, including in Area 11. *Washington v. Courville*, 676 P. 2d 1011 (Wash. Ct. App. 1983), discussed in the petition at page 6, documents one such instance. While respondents assert that *Courville* involved purely individual fishing "in which no tribe participated" (Opp. 3 n.4), they are wrong; the case expressly held that the fishing in that case in Area 11 was protected by the Muckleshoot's *tribal* rights under the Stevens treaties. *See Courville*, 676 P.2d at 1016 (concluding "that Adelaide Beach [in Area 11] was and is a usual and accustomed fishing ground of the Muckleshoot Indian Tribe").

5. Respondents suggest that the Muckleshoot Tribe's participation in other sub-proceedings seeking clarification of other tribes' U&A fishing areas is somehow in conflict with its position here (Opp. 2), and even assert that the Muckleshoot Tribe is judicially estopped from urging *res judicata* (Opp. 9-11). But in the other sub-proceedings cited by respondents, the Muckleshoot Tribe has sought only enforcement of the order as written or interpretation of genuinely ambiguous language. Phrases like the "environs of Seattle" leave a measure of indefiniteness about the precise area encompassed that is susceptible to judicial resolution. No such indefiniteness can be relied upon to support the determination that "Puget Sound" in

Finding 76 in fact means "Elliott Bay." The court below simply rewrote rather than construed the language used.

The Muckleshoot Tribe has never urged the courts below to disregard the unambiguous language of any provision of Judge Boldt's 1974 final order. The Muckleshoot Tribe's positions and arguments in previous cases are thus fully consistent with its present contention that the court below cannot disregard the actual Boldt decision and delve back into the record to decide anew the proper area of a tribal U&A.

Indeed, to the extent that there has been judicial estoppel with regard to the matters here at issue, it is against respondents. At trial, the United States Department of Justice requested a Muckleshoot U&A including "the saltwater of the Puget Sound," and the Puyallup Tribe joined in the United States's proposal (ER 120-22); the other respondent tribes acquiesced in that language as a condition of intervention. Yet respondents now assert that Judge Boldt could not really have meant the very language that they themselves joined in proposing. This is precisely the sort of conflicting legal position that the Court held creates a judicial estoppel in *New Hampshire v. Maine*, 121 S. Ct. 1808, 1814 (2001) (noting that judicial estoppel applies "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position," but later "assume[s] a contrary position").

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

ROBERT L. OTSEA, JR.
Muckleshoot Indian Tribe
39015-172nd Avenue, S.E.
Auburn, WA 98092

GREGORY M. O'LEARY
821 Second Avenue
Suite 2000
Seattle, WA 98104

DONALD B. AYER
(Counsel of Record)
MICHAEL S. FRIED
CYNTHIA L. BAUERLY
Jones, Day, Reavis & Pogue
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Counsel for Petitioner

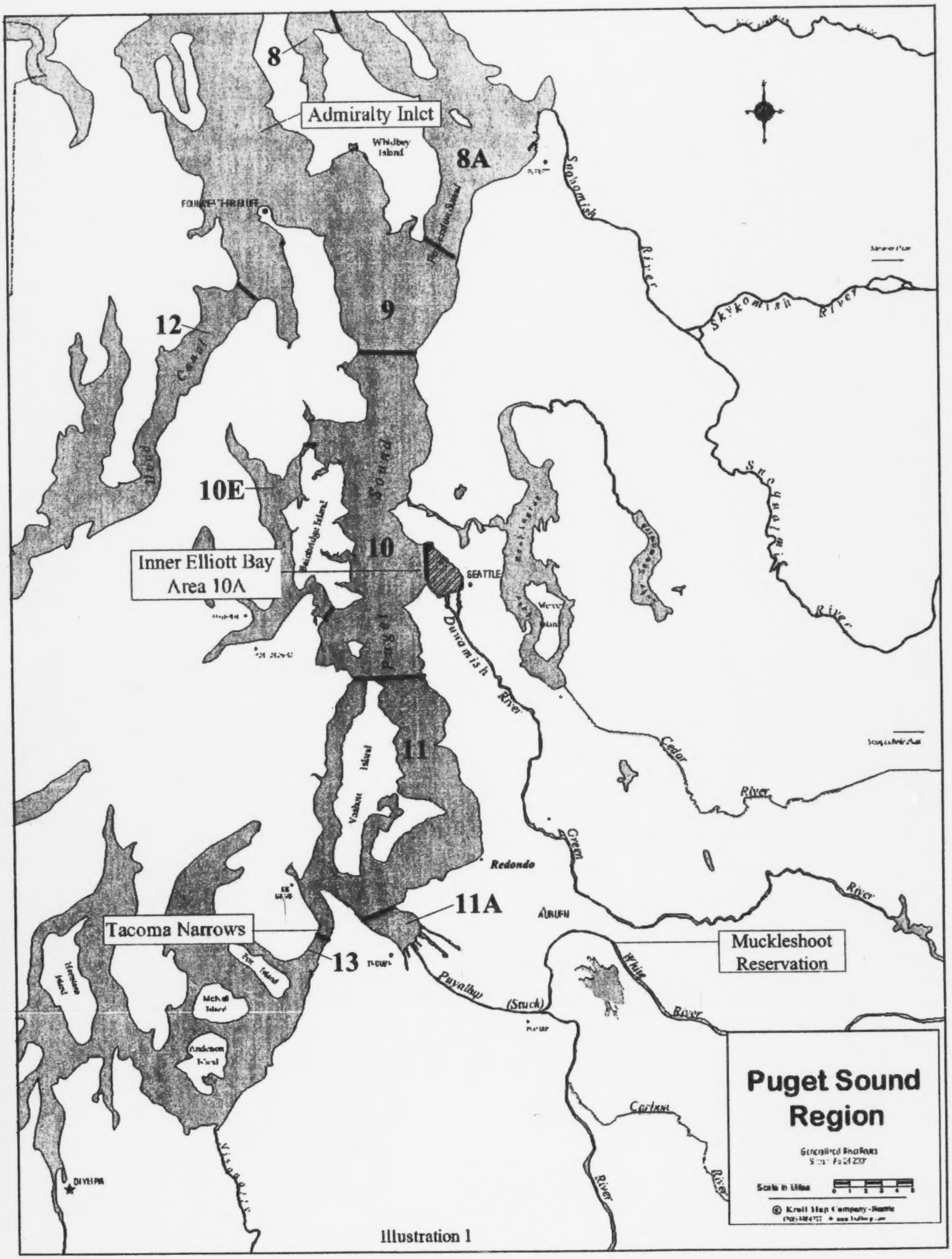


Illustration 1

BEST AVAILABLE COPY